

Aleksander Peczenik

THE BASIS OF LEGAL JUSTIFICATION

Lund 1983

THE BASIS OF LEGAL JUSTIFICATION

av

Aleksander Peczenik, Dr Jur, JK

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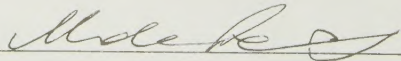
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Abstract The purpose of this book is to set forth <u>foundations of the legal method</u> and to defend this method from recent, often inadequate, criticism. How can one deeply <u>justify</u> the fact that <u>legal reasoning</u> mutually adapts propositions about two different subjects (the <u>sources of the law</u> and <u>moral values</u>) and of different kind (descriptive and evaluative)? The answer to this question is that the "mixed" legal reasoning can be rational. <u>Rationality</u> itself is a union of two ideas, the idea that one should seek support for one's theses (and hence <u>coherence</u>) and the idea that one should seek <u>generality</u> (inter alia, general theories). Legal reasoning is undoubtedly oriented towards generality. It receives, as well, support from the sources of the law (statutes, precedents, etc.). Morality also supports juristic conclusions. Legal reasoning expresses a rational compromise between <u>legal certainty</u> and continually created new <u>evaluations</u> . The limits of rationality depend on our <u>form of life</u> . From the content: What is <u>valid law</u> ? Types of <u>reasons in the law</u> . The sources of the law. Application of law: precise <u>interpretation</u> , subsumption, reduction, elimination, <u>statutory analogy</u> , legal induction, teleological construction of statutes, collision-norms. <u>Legal research</u> , <u>growth of science</u> and moral theory: formal requirements of science, the legal "data", the analytical ("doctrinal") study of law and induction, falsificationism, and the methodology of <u>research programs</u> . <u>Foundations of knowledge</u> and <u>legal ideology</u> : the spiral of legal experience, the form of life, pluralism of legal knowledge.				
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The present book constitutes an improved version, related to but not identical with my German work Grundlagen der juristischen Argumentation.

Aleksander Peczenik

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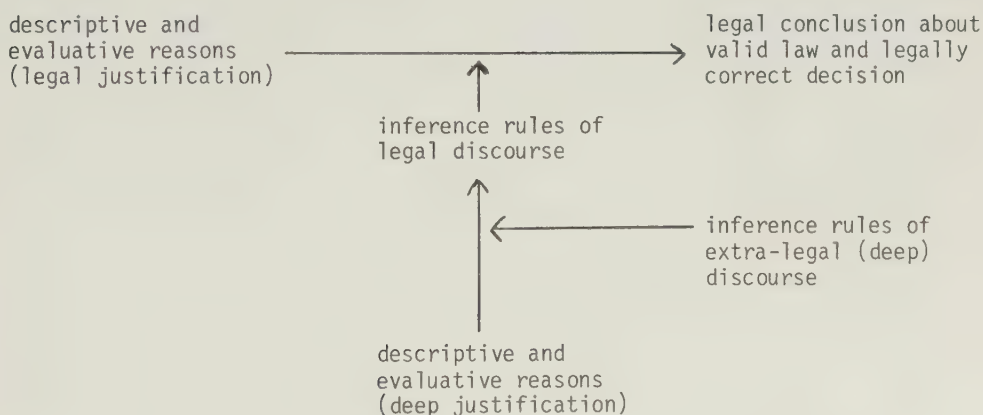
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INTRODUCTION

The purpose of this book is to set forth foundations of the legal method and to defend this method from recent, often inadequate, criticism. The book should perhaps be entitled Justification of Legal Justification or, more completely, The Deep Justification of the Contextually Sufficient¹ Legal Justification. "Justification" is defined as giving sufficient reasons for a conclusion.² But what does "sufficient" mean? Reasons sufficient for a lawyer might be insufficient for a moralist, a political opponent, a philosopher, etc. The latter three might demand a justification of premises that the lawyer takes for granted. Juristic conclusions, judicial decisions and the like can thus be either justified (a) within the framework of legal reasoning or (b) outside it.³ I will call the former the contextually sufficient legal justification. The latter can be either (b1) the deep (fundamental) justification which provides support or criticism to the premises that the lawyer takes for granted, or (b2) justification of another type, e.g. historical (if historical justification is possible). The contextually sufficient legal justification is based on the established legal tradition, and various parts of the tradition itself may - for various purposes and in various contexts - require the deep justification. The deepest justification is as fundamental as possible in the optimal conditions of discourse.⁴ Utilizing Toulmin's manner of writing, one can formulate this distinction, as follows:⁵



The present work is developed around the following theses:

1) Contextually sufficient legal justification is in part both different from and similar to scientific justification.

2) A deep justification of contextually sufficient legal justification is difficult to achieve because non-deductive inferences play a greater role in that process than, for instance, in scientific justification.

3) One can explain the unusual number of non-deductive inferences in the law by pointing out that contextually sufficient legal justification is a compromise between description of the sources of the law, and their creative adaptation to evaluations which are continually generated by the person performing the reasoning.

4) The description of the sources is deeply justifiable in the manner of ordinary theories, that is, in view of the theory of science, and is ultimately governed by the regulative idea of truth. The creative adaptation is deeply justifiable in the manner of normative moral theories, that is, via a reflective equilibrium of various considerations, and is ultimately governed by the regulative idea of practical rightness. The compromise between description and evaluation is justified, if it is rational and acceptable. The standards of rationality and acceptability are determined by our way of life.

In Chapter 1, I present a brief outline of a general theory of non-deductive inferences. I also deal with the non-deductive steps necessary to identify a legal system and to provide it with the legal "ought"-quality. In Chapter 2, I classify the non-deductive steps contained in the contextually sufficient legal justification. In Chapter 3 and following, I discuss the deep justification of the legal reasoning. In Chapter 3, I present some clarifications concerning the theory of non-deductive inferences. I also compare legal reasoning with moral reasoning. In Chapter 4, I discuss rationality of legal reasoning. In Chapter 5, I deal with the limits of reason, determined by our way of life. In Chapter 6, I outline very briefly a normative theory of deep justification in the law. In Chapter 7, finally, I compare legal and scientific reasoning, revealing some peculiarities of the former.

Two main intellectual tools, applied in this book, are conceptual analysis and descriptive sociology. The discussion about legal justification is traditionally obscured by lack of clarity, therefore we need conceptual analysis. On the other hand, to judge correctness of legal justification, one must first adequately describe it. Moreover, this description is a necessary precondition of the correct analysis of many legal concepts, the meaning of which presupposes a complex system of law.

1. TRANSFORMATION INTO THE LAW

1.1. GENERAL REMARKS ABOUT TRANSFORMATIONS¹

1.1.1. Some Examples of Transformations

Human knowledge and justified evaluations are often based on transformations ("jumps"). In some cases, one "jumps" from one level to another. The following are examples of "levels". Perceptions (e.g., seeing a field of colours and shapes).¹ Propositions about individual facts (speaking about individual facts and about their value). General theories (constructing general theories, laws of nature, norm-systems, value-systems). The latter two levels can be called "levels of knowledge"; the status of the former is more complex and cannot be discussed in the present work.²

1.1.2 The Concept of Transformation

A transformation is performed from p to q if, and only if, the following conditions are fulfilled:

- a) truth (or validity, etc.) of p is proffered as a sufficient reason for affirming q; and
- b) p does not deductively entail q; and
- c) an addition of a trivial and commonly known ("suppressed") premise does not make the passage from p to q a deductive one.¹

The simplest formula of a transformation is pTq . Both p and q, however, may consist of more than one proposition. Thus, one can use a more complex formula: $(p_1, \dots, p_m T q_1, \dots, q_n)$.

Some explanations. (1) The symbols "p" and "q" refer to many different things, for instance perceptions, descriptive propositions, or value propositions. We cannot yet make a complete list of p's and q's, to which one may fruitfully apply the theory of transformations.

(2) If p (or $p_1, \dots, p_m$) and q are descriptive (cognitive) propositions, then truth of p is proffered as a reason for affirming the truth of q. One can say that p reports an alleged fact and q consists in a conclusion about facts. Cognitivists would say the same when p (or an element of the set

$p_1, \dots, p_m$) and q are value-propositions; some non-cognitivists would then rather speak about rightness of p and q .²

(3) No reason is alone sufficient for affirming q . "Sufficient reason" (a) is important, and (b) is "sufficient given the normal background"; paraphrasing a well-known remark about causation³, one can say that it completes the set of sufficient reasons for the conclusion; it is sufficient "ceteris paribus".

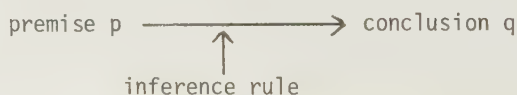
(4) "Jumps" do not express logical necessity; p may be true and proffered as a sufficient reason for q , and yet q can be false. A justified "jump" makes, however, likely that p is true. See Chapter 4 and 5 passim.

The word "transformation" includes many very different things. Some transformations are elementary; everybody makes them as a result of innate disposition and cultural tradition. Other transformations are performed by a limited group of people (e.g., lawyers). From another point of view, some transformations are related to generalizing (for example, to theory-construction), others to choosing between competing interpretations of obscure terms. See below sections 3.1. and 3.2.

1.1.3. The Concept of Transformation Rules¹

In the context of justification, transformations can be criticized or defended, found right or wrong. There are not only regularly repeated acts of transformation but also transformation rules.² See, however, section 3.2. One can distinguish three kinds of cases: (i) cases in which transformations undoubtedly follow clear transformation rules; (ii) cases in which an existing transformation rule is (a) interpreted in a given precise way, (b) restricted, (c) extended or (d) abandoned; and, (iii) cases to which no existing transformation rule applies, and for which a new rule need be formulated.³

Transformation rules are a special case of inference rules.⁴ Assume that a proposition (or set of propositions) q is derived from a proposition (or set of propositions) p . An inference rule might justify this derivation and thus justify the proposition "if p then q ". With Toulmin's way of writing we can formulate this point as follows:



The step from p to q is not a transformation and the inference rule is not a transformation rule if the following conditions are fulfilled:

- 1) The inference rule in question, together with p, logically entails q; and
- 2) The inference rule is itself analytic.

An inference rule can always be replaced by a corresponding premise.⁵ I will present tacit assumptions, which an ordinary legal researcher would be able to articulate, as premises, and deeper tacit assumptions, exceeding contextually sufficient justification, as inference rules.

1.1.4. Making Non-deductive Steps Deductive

One can always make a non-deductive step (a transformation) deductive simply by adding an established or ad hoc non-analytic inference rule, or a corresponding premise. For example, the non-deductive step from p to q,

$$\frac{p}{q}$$

becomes deductive when one adds to it the statement "if p then q", (in symbols " $p \rightarrow q$ "); thus, the following inference is a correct syllogism:

$$\frac{p \quad p \rightarrow q}{q}$$

Such a deductive presentation does not distinguish between good and bad justification. If this additional premise or inference rule is false or wrong, so too is the justification based upon it. Imagine, for instance, the inference from "A is a soldier" to "A is a hero", based on the inference rule "a soldier is almost certainly a hero". Nor does such a deductive presentation correctly describe the psychology of justification. Still, we achieve clarity of thought by presenting (good or bad) reasoning in this way. This mode of presentation helps, for instance, to remove concealed contradictions, ambiguities, unwarranted assumptions and other errors. It is a powerful method to achieve coherence of beliefs and thus rationality.¹ See section 4.1.4. infra.

1.2. TRANSFORMATION INTO NORMS

1.2.1. Existence and Validity of a Norm. Transformation Necessary to State That a Norm Exists

What does the expression "the norm N exists" mean?¹ The answer to this question depends on many factors, inter alia on the adopted ontology.² Let us mention some possibilities:

- 1) A written norm is an inscription (or class of inscriptions) having a normative meaning; an unwritten norm is an utterance (or class of utterances) having a normative meaning.³
- 2) A norm is a kind of proposition subsisting in a language, if this language has resources necessary to formulate the norm.⁴
- 3) A norm exists if some persons remember an utterance or an inscription (or a class of thereof) having a normative meaning.
- 4) A norm exists as an internalized pattern of behavior or as a reason for action: People have a disposition to argue that a given way of acting is prescribed, permitted, forbidden, and so on, and they have a disposition to act according to these prescriptions, permissions, prohibitions, etc.
- 5) A norm exists, if more than one of these conditions are fulfilled.⁵

Some criteria help people to discover the existence of a norm but since a norm can exist in many senses or manners, one must make a choice between many sets of criteria. The step from the criteria to the conclusion that the norm exists is thus non-deductive (a transformation).

Some argue that a norm's existence is equivalent to its validity.⁶ According to another opinion, validity is derivative: The norm N_1 is valid, if and only if there exists the norm N_2 which says that N_1 ought to be observed.⁷ Due to the ambiguity of the term "valid", good reasons support both views; I find the second one more convincing, however.

1.2.2. Normative Meaning

Let us call linguistic units corresponding to (or in some views identical with) norms, norm-expressive statements. One must distinguish norm-expressive from norm-descriptive statements, which say that the norm N exists or is

valid.¹ Some statements are "mixed", and can be interpreted as norm-descriptive, norm-expressive, or clusters of both² (norm-contentions³). A norm-expressive statement qualifies some state of affairs, most often some human action. Most elementary norm-expressive statements qualify a human action as prescribed (obligatory), permitted, or prohibited (forbidden).⁴ The statement "you should not park here" thus qualifies the action of "parking here" as prohibited. More sophisticated norm-expressive statements will be discussed in section 1.2.3., infra.

Normative qualification has a volitional component. Opařek represents this component with the Latin term "ut", whose meaning is something like "let it be that".⁵ This component is presupposed by the norm-statement, regardless of whether one can identify a person whose will the norm-statement is supposed to express (Olivecrona, independent imperatives⁶).

One can ask the question whether transformations are necessary in order to say whether a given statement is or is not norm-expressive.

1.2.3. Types of Norms

Norms are either regulative or constitutive.¹ Regulative norms qualify a state of affairs as prescribed, permitted or prohibited. Constitutive norms enable us to speak about institutional facts, such as chess; whoever systematically violates chess rules does not play chess.²

Two special cases of constitutive norms deserve special mention. Legal qualification-norms give some persons or states of affairs a legal quality, with which some other norms are connected.³ An example is "the parent shall be guardians of a minor". (The parents thus obtain the quality of being guardians.)⁴ Legal competence-norms enable one to bring about, through one's acts, desired legal effects. An example is "the owner may sell the property", or "the general assembly may appoint the secretary general".⁵

The above classification does not describe ways in which one formulates norm-expressive statements. A single norm-expressive statement, written in a statute, can correspond to one "complete" norm-expressive statement, defined according to the above classification; it can also, however, correspond to many of them; or to a part of a "complete"⁶ norm-expressive statement; or to a cluster of parts of various norm-expressive statements; or to each of these things combined with something else (e.g. a fact-describing statement).

To answer the tricky question "why is this classification formulated?"

one must turn to the roots of the idea of logical reconstructionism. The question whether all norms are logically reducible to regulative ones is even more profound, and one must answer it on what approaches an ontological level.⁷ Perhaps, the reduction must be based on "jumps".

From another point of view, one can divide the class of norms into rules and principles. An example of a rule is "one should not drive faster than 55 mph". An example of a principle is "you ought to love your neighbour". This distinction bears many definitions.⁸ For example: 1) a rule can be either fulfilled or violated, tertium non datur, and a principle can be fulfilled to a certain degree, more or less;⁹ or 2) a rule expresses directly the normative qualification in question, whereas a principle states a reason which can be used to argue (via "jumps") for a given normative qualification.¹⁰ A norm which prima facie looks like a rule can be interpreted as a principle or vice versa.¹¹

1.2.4. Transformations Connected With Rights

An inference from a statement about facts, norms and/or values to a statement that a right exists involves a series of "jumps". Consider, at first, moral rights. Rights are individual-oriented.¹ In a weak way, they are related to principles, since both rights and principles are reasons in favor of some norms.² But how can one identify a right? If there are some practices³ and/or some characteristics of human nature,⁴ showing that a given interest, need, want, etc. of an individual has value (for instance showing that it is valuable that he non-collectively enjoy some goods)⁵; and/or if there are some practices and/or some characteristics of human nature showing that it is valuable that the will of this individual is to some extent decisive; then (but not only then) this individual has a kind of a right.⁶ The practice of condemning thieves, everybody's interest in protecting his property, and so on, reveal that everybody has a moral right to his property. Some moral norms are valid which in one or another way protect this right; it follows that one ought to observe some of such norms, but not which ones; e.g. it does not follow in which way property ought to be protected. (But one also "jumps" from other norms to rights, in "circles" or "spirales".)

A "jump" occurs from interests, needs, wants, the will, and their value, to the conclusion about the right.⁷ Another "jump" occurs from the moral right to moral norms prescribing in what way the right is to be protected. All this is vague, ambiguous, evaluatively open⁸, incomplete, often in-

coherent, but very important.

Some legal rights, such as ownership, are less elusive but still complex. Let us consider the typical version of the concept of ownership. If I have bought this property or if I have inherited it or if I have received it as a gift, then I own the property. If I own the property then I am permitted to use it and I have a competence to sell it and I have a competence to start a legal action against a person interfering with my right. "Ownership" has thus been interpreted as a tool of presentation, an intermediate concept, summarizing "factual conditions" (to buy, to inherit, etc.) and normative consequences.⁹ Both the list of conditions and the list of consequences is, however, open and can be the subject-matter of reasonable discussion. Moreover, one can comprehend what this word means, even if one cannot state precisely any of these lists. We can utilize three methods in order to discover the various "jumps" one must perform before calling anybody an owner.

1. The first method emphasizes ontological problems. Ownership is an institution, not reducible to "brute" facts.¹⁰ It is not identical with the use of force against a person who infringes upon that right because the right comes first and the use of force later (if, for instance, someone has stolen the property). Nor it is identical with the fact that the owner uses the property. (The owner can lose it, and a thief can use it).¹¹
2. The second method emphasizes the complexity of the relationship between ownership and legal rules. Ownership is not identical with the legal rules governing ownership. The language itself argues against any such identification. One may claim that one has the right of ownership, but not that one has legal rules.¹² The essential question concerns, however, analytic relation, not identity.¹³ Is ownership nothing else but what is constituted by legal rules? Or does the concept of "ownership" presuppose something more than legal rules (an "irreducible rest")? Some reasons seem to support the latter conclusion.
3. The third method emphasizes infinite regress in the definition of ownership:
 - a) One identifies an owner by means of factual conditions, but these one defines by their relation to ownership. A became the owner of the property by buying it. To "buy" is to obtain the property from its former owner. Is this an infinite regress?

The legal order as a whole contains rules for cutting off the regress. The first owner of the discussed chain has gained his position through occupation, acquisition in good faith, etc.¹⁴ But again, occupation would not have created the "first ownership", had "first owner" known that somebody else owned the property; in this way, the concept of ownership-by-occupation presupposes that nobody was the owner at the moment of occupation.^{15,16}

- b) Usually, it is essential to ownership that the owner be competent to sell the property. This means that he is competent to see to it that the buyer becomes the owner of the property. Moreover, the buyer is competent to sell to another buyer and so on ad infinitum. Is this a vicious circle? When one uses it as part of a definition of ownership, it is. On the other hand, if one had already defined the concept of ownership in another way, e.g. in connection with "factual conditions"¹⁷, the circle disappears. Any definition of ownership which leaves out the normative consequences, however, is evaluatively open and one therefore needs a "jump" in order to complete this definition and to identify ownership.

1.2.5. Can Norm-expressive Statements be Derived Deductively?

Let us now leave "jumps" necessary to derive propositions about norms or rights and pass to the derivation of norms themselves. Much doubt exists whether one can deductively derive a norm-expressive "ought-statement" from a descriptive "is-statement".^{1,2} Such inferences apparently involve non-deductive "jumps".³

Some authors deny also the possibility of deduction between norm-expressive statements, mainly because they define logical entailment in terms of truth (if premises are true then the conclusion is true), and norm-expressive statements are neither true nor false. Moritz has written, for example, that one cannot deduce the norm-expressive statement "Keep this promise" from the norm-expressive statement "Keep your promises" together with the descriptive statement "This is a promise of yours".⁴ To avoid this kind of problems, von Wright has constructed a logic of special deontic propositions, not logic of norms.⁵ Other authors admit deduction between norms. Some of them see norms as true or false⁶, at least in a formal sense. Other accept logic without truth.⁷ In my opinion, deduction between norms can be semantically based on the concept of normative qualification⁸, not truth. See also section 4.3. infra re formal truth.

1.3. WHAT IS LAW?

1.3.1. The Purpose of Our Theory of Law

The ordinary use of the concepts "law" and "valid law" is not coherent.¹ "Law" may mean actually observed law, enforced law, valid law etc. "Valid law" may mean sound law, accepted law, correctly enacted law, etc. I will suggest a recommendation how to use the concepts "law" and "valid law" in a way both relatively coherent and reconcilable with ordinary usage. Our theory is thus neither fully descriptive nor arbitrarily prescriptive but reconciles description and prescription.² It thus reconciles the following demands in the optimal manner (as much as possible):

1. It should be coherent.
2. It should identify as legal (legally valid) all and only the phenomena ordinarily³ enumerated as (valid) law. (An extensionally reportive definition).⁴
3. It should regard as essential to the concepts "law" and "valid law" all and only the properties ordinarily regarded as essential. (An intentionally reportive definition).⁵
4. It should help to solve the epistemological problems of deep justification in legal reasoning.

Our theory is not merely concerned with the words "law", "legal", etc.; these words are neither sufficient nor necessary conditions of the legal discourse. I will rather arrange the use of many words in a way showing what we in our culture regard as important properties of all or nearly all legal systems.⁶

1.3.2. "Bibliographical Theory" of Law

One may enumerate legal statutes, precedents, etc. of a given country, without recourse to any general definition of law. This information is, however, more bibliographical than theoretical.¹ The law student often begins his studies by acquiring a general view of this "bibliography". The lawyer learns, too, how to perform legal reasoning. He thus masters the use of the terms "law", "valid law", and so on. Such words are used along many different and intertwined thought-lines, and one may reconstruct them as a variety ("a mixed crowd") of language-games.²

1.3.3. Transformation Into the Law and Transformation Inside the Law

It is generally thought that the law-character of a norm, that is its quality of being legal norm, is system-related. A deep (not merely "bibliographical") answer to the question "what norms are legal?", for example "what norms are Swedish legal norms?", results from a two step procedure.¹ First, one must establish the internal law-character of a given norm, that is, that it belongs to a given system of norms; for example, one establishes that a certain norm of the Penal Code, 1962, (say, BrB 3:1) belongs to the Swedish law. Second, one must establish the external law-character of this system, that is, that this system of norms as a whole (for instance, the Swedish law as a whole) is a legal system.² The first step presupposes the second, but the second is often quite trivial.

I will try to present some support for the following theses. These steps correspond to two kinds of transformation: "transformation into the law" (the second step) and "transformation inside the law" (the first step).³ Many persons in many situations use such concepts as "the law" or "valid law" in a way which would be incoherent, had they not performed at least one transformation of each kind. The use of these concepts by these persons in these situations thus presupposes these transformations.⁴

1.3.4. Presuppositions of the Concept "Legal System". Identification and Justification of the Law

The ordinary use of the concepts "law" and "legal system" supports the following theses:

- 1) Everybody uses the concepts "law" and "legal system" in a way that vaguely presupposes the existence of legal criteria, that is presupposes the following inference rule: If a number of social facts exists (F_1-F_n) and if certain normative and/or evaluative requirements (W) are fulfilled then the normative system (N) is a legal system. I will argue that this inference is a transformation. Let us call it transformation into the law.
- 2) For many people, both legal specialists and laymen, the statement "N is a legal system" (or "N is the law") presupposes that N ought to be observed.¹ Hence the following inference rule for the category-transformation² exists: If a number of social facts exist (F_1-F_n) and if certain normative and/or evaluative requirements (W) are fulfilled,

then the normative system (N) ought to be observed from the legal point of view. See infra section 1.4.7.

The term "category-transformation" emphasizes two things: that the legal "ought" is a separate category, irreducible to anything extra-legal; and that the step from the criteria of law to this legal "ought" is non-deductive.

If one disregards this "legal-ought implication" of the concept "(valid) law", one still must identify the legal sources such as statutes, precedents, etc. Since the established criteria of law are not sufficient to constitute a deep reason for the conclusion that the norm-system in question is a legal system, this identification involves a non-deductive step which I call the criteria-transformation;³ see infra 1.3.5.

- 3) For a slightly less extensive class of people (for instance not for extreme Legal Positivists), this legal "ought" presupposes, finally, a claim to be justifiable.⁴ In other words, one might give "underpinning"⁵ reasons in favour of a given definition of law and point out that it corresponds to the established moral and linguistic intuitions.

To give reasons for the conclusion that the norm in question, or the normative system as a whole, ought to be observed from the legal point of view can be called (deep) justification of (valid) law. To give reasons in favour of the conclusion that this norm, or this norm-system, is a legal norm, or a legal system, can be called identification of law.⁶

1.3.5. Criteria of External Law-character of a Normative System: Facts and Values

The criteria-transformation is tacitly presupposed by the procedures and concepts used within contextually sufficient identification and justification of law. It must be explicitly written down by one attempting deep justification. There are, inter alia, the following necessary conditions of the law-character of a norm-system, and consequently of the law-character of its highest norms such as the constitution. This system constitutes a "dynamical" hierarchy of norms in which higher norms determine the proper method of creating lower norms.¹ The constitution tells us, for instance, how to enact statutes, statutes tell us how to make judicial decisions, and so on. Furthermore, it

is effective. The norms of conduct belonging to this system are by and large observed; most of them are at least not systematically violated. Other norms establish threat of sanction against violators. These "sanctioning" norms are by and large applied by a force-exercising organization. Most people observe, for example, most prohibitions protecting property of others; when somebody does not, then the courts, the police, etc. apply to him norms providing, for example, how he should be punished.²

Effectiveness is, however, not sufficient. The celebrated case in Rhodesia between Madzimbamuto and Lardner-Burke et. al. shows that although the "laws" made by the Smith regime were effective they were not laws from the point of view of UK courts.^{3,4}

A normative system is a legal system if it is hierarchical in the indicated sense, if it is by and large effective, if some evaluative criteria are fulfilled, see below, and if many of the following facts occur.^{5,6}

1. Facts marking out a legal system from the normative systems of competing organizations, such as the Mafia's. If we consider a given territory we shall find that in this territory the majority⁷ of legal norms are observed by far more people than the norms of the Mafia. The legal system governs the work of the paramount force-exercising organization in a given territory.⁸ The legal system is "omnivorous":⁹ it controls the society as a whole, in all of its aspects, at least indirectly (by sanctioning all societal norms); it creates a basic frame for everything that takes place in the society. According to its content, it claims to be the supreme system of norms in the society¹⁰, it claims the sole right to the physical exercise of force in its territory¹¹, and it claims authority to regulate any type of behavior.¹² It "contains norms the purpose of which is to give binding force within the system to norms which do not belong to it."¹³ It is frequently interpreted by professional lawyers, using noticeably technical and advanced methods and doctrines.¹⁴ It causes people to develop special attitudes toward it, inter alia to recognize its authority, and so on. One can doubt to what extent the attitudes of the Mafia members toward their organization are similar.¹⁵ Furthermore, the modern state differs from the Mafia in a number of other - perhaps more trivial - respects, for instance in that the members of the police force wear uniforms, police stations carry signs indicating what they are, the boundary between states is openly delimited, etc.

2. Facts marking out the legal system from moral norms. The law possesses a relatively high degree of institutionalization.¹⁶ This means, inter alia, that the police, the judiciary, etc., are engaged full-time in compelling people to observe the legal system, whereas only few priests work full-time

as guardians of morals. Moreover, some constitutive legal norms establish such institutions as judiciary; other legal norms say that these institutions are under a duty to apply still other legal norms.¹⁷ The law discourages some behavior by using such forms of organized force as trial leading to imprisonment.¹⁸ The law has a relatively high fixity and precision.¹⁹

This list is not exhaustive. One can add several other facts, such as the relative generality and duration of the legal system vis-a-vis some other norm-systems.²⁰

The facts themselves are complex. Some of them are institutional, charged with values and constituting a result of many transformations.²¹ Yet no such list of facts, however intricate, is sufficient as a deep reason for the conclusion that the norm-system in question is a legal system. It is only a contextually-sufficient reason. In some extraordinary situations, it is not even that. When, for example, two or more normative systems compete in the manner they did in Russia in 1917, one has to make a choice as to which (if either) is to be regarded as a legal system. (The same problem occurs when only one normative system exists in a given territory and fulfills many criteria of law, yet is extremely immoral, e.g. Hitler's or Pol Pot's "law"). This choice might be causally determined by personal gains, etc.²² If so, it lacks convincing justification. A contextually sufficient legal justification might be impossible. Still one can attempt a deep justification and support the choice with evaluative arguments, thus assuming that the normative system is legal only if it does not contain or generate too many grossly immoral norms or practices.²³ The list of morally valuable characteristics provided by the criteria of law is, however, open. Some are clearly accepted by many people; some are vaguely implied by social practice. A somewhat smaller group of persons act in a manner which reveals stronger presuppositions about the values implied by the criteria of law: some persons hold for instance, that the values are mostly negative (the non-violation of life, freedom, property, and so on).²⁴ Anyway, not everyone has a clear view in advance of the values which will be decisive for him as to what is and what is not a legal system. Only when it is put in the concrete situation does he "see" it clearly.

The two kinds of criteria, factual and evaluative, are often combined into a "mixed bag", for instance when A argues that X is a legal system law since X is effective and promotes the value of justice.²⁵

The combination of facts and values leads thus via a chain of operations to the conclusion that the normative system is a legal system.²⁶ This combination is thus a sufficient condition of the law-character of a normative

system. (The existence of a great number of the discussed facts is a necessary condition of it. Some persons think that the fulfilment of the evaluative criteria is another necessary condition.) The quality of "being the law" is, however, neither identical with nor entailed by any combination of underlying facts and non-legal values. People perform a criteria-transformation from social facts and non-legal values to the above-mentioned conclusion.²⁷ I agree that in most cases the concept of "law" is like the concept of "pregnancy"²⁸: a system is either legal or not (and a woman is either pregnant or not). But it makes sense to argue that a normative system, prima facie fulfilling the criteria of law, is, after all, not a legal system. See preceding discussion concerning the competing normative systems in Russia of 1917. One must decide whether such a borderline normative system is legal.²⁹ Moreover, one must decide whether a given normative system is or is not such a borderline case. Both decisions involve a cognitive and a volitional commitment to the chosen criteria.³⁰ To some extent, it follows established transformation rules; to some extent it transcends them.³¹

The criteria-transformation is necessary because the criteria of law are vague and changing³²: because people are only partly committed to them; and because people nevertheless assume that law is something that can be cognitively identified.

1.3.6. Terminology: "Law" and "Valid Law"

A norm has a normative meaning. It must command, permit, prohibit, confer competence, qualify persons (e.g. as owners) or things (e.g. as property) etc. A legal norm has, apart from normative meaning, a special characteristic of being legal. It may thus be identified by means of the criteria-transformation. Moreover, it is legally valid and this means that one ought to observe it¹ from the legal point of view.² The term "valid law" emphasizes the category-transformation. It emphasizes "the ought", that is, the evaluative meaning components both in the if-clause and in the then-clause of the inference rule for the transformation into the law. The terms "law" and "valid law" are thus not intensionally synonymous. As regards their extensional relation, two interpretations are possible: (1) The term "law" and "valid law" denote the same norms. Consequently, a derogated norm is no longer legally valid, and this means it is no longer legal. Legal history tells us what at one time was (valid) law. (2) The term "valid law" denotes norms which still are in force. The term "law" denotes the norms that either

are or were in force, for instance derogated statutes.³

Metaphorically speaking, a legally valid norm has two exclamation marks: !_L!p. The non-indexed exclamation mark "!" indicates normative meaning. The indexed exclamation mark "!_L" indicates legal validity. Similarly, a morally valid norm can be expressed in the following way: !_M!p; a valid rule of football can be expressed as !_F!p and so on.⁴

1.4. WHAT IS VALID LAW?

1.4.1. Derivative Character of Legal Validity

One cannot organize a large part of the complex linguistic use of the concept "(valid) law" into a coherent whole unless it is assumed that legal validity is derivative. See section 1.2.1., supra. The idea of derivation here indicates a transitive and symmetrical relation. According to this line of reasoning, a norm is legally valid if valid legal norms of higher standing imply that it ought to be observed from the legal point of view. One version of this thought-line (Merkel, Kelsen) assumes, additionally, that this is the case if the norm in question has been created in accordance with valid norms of higher standing which determine who is authorized to make the norm and how this should be done. The higher norm itself is valid if it has been made in a way prescribed by a still higher valid norm, and so on.¹ But the highest legal norms, for example the norms of the constitution, cannot derive their validity from validity of still higher legal norms, since no such norms are valid in the relevant legal system.

Within a contextually sufficient legal justification, one takes for granted the validity of the highest legal norms. Within a deep justification, however, it is a puzzle.

1.4.2. Validity of the Highest Legal Norms and the Idea of Natural Law

The Natural Law tradition offers the following solution to this problem: The highest legal norms derive their validity from norms belonging to Natural Law or from moral norms, and these have intrinsic validity.

Many advocates of Natural Law, including Grotius, Pufendorf and Verdross, have distinguished between the factual law-character of a normative system, depending solely on such facts as the will of authorities and efficiency of

sanctions, and, on the other hand, its binding force, or its quality as a system which ought to be observed.¹ They treat binding force as dependent on whether or not the norms belonging to this system (all of them or the highest ones, etc.) conform to Natural Law. What is Natural Law? Classical Natural-Law thinkers, for instance Thomasius, distinguished between the Natural Law, deciding what is iustum, and morality, deciding what is honestum.² As regards the sources of Natural Law, one can distinguish the following, often intertwined, standpoints:

1. The empirical version. Natural Law is empirically related to some invariant characteristics of humans in general or of humans belonging to a given culture.³ (It is, however, not clear how this fact can create obligation to obey the Natural Law).
2. The religious version. Natural-Law expresses God's will.
3. The rationalistic version. Natural Law is rationally cognizable. This idea has been expressed, inter alia, by the Stoics⁴, Ibn Daud, Maimonides⁵, Aquinas⁶, Hobbes, Locke, Grotius, Pufendorf⁷, Kant⁸, Fuller⁹ and Finnis¹⁰.

To further understand the last version, we must remember that the tradition of Natural Law consists mainly of two levels.¹¹ The first, the idea of a natural normative order (lex aeterna and ius naturale), has been emphasized by most of the Natural Law schools. The Stoics, for example, made comparisons between the universal and eternal logos causally ruling the universe, and the equally universal and eternal Natural Law applicable to human lives.¹² The second, the idea of justice, was expressed in the famous Roman maxim suum cuique tribuere (give anybody his own). This view dominated Aristotle's theory of Natural Law, constituted an important part of Aquinas's theory, and was applied by others to develop the conception of natural rights.¹³ The idea that Natural Law is rationally cognizable is often connected with this view.

One can view many versions of the rational cognizance of justice and natural rights in connection with the idea of the suum. Every human being has by nature a right to all that is his own or his due, that is, to his life, body, thoughts, actions, dignity, etc.¹⁴ These views constituted the core of Grotius's and Pufendorf's theories, and were shared to some extent by Locke.¹⁵ The idea of the suum justified the binding force of promises (including the social contract): The promisor voluntarily alienated a part of his suum (that is either his property or his action) and put it at the

disposal of the promisee, who completed the transfer by accepting the promise, thereby joining the property or the action to his suum.¹⁶

The idea of the social contract is unusually persistent. Mention must be made of the Hebrew belief in the Covenant established between Jahve and the Israeli people; the ancient Germanic belief concerning the contract between the ruled and the ruler;¹⁷ doctrines of some Sophists, for instance Lico-phronos;¹⁸ some points in Aristotle's philosophy;¹⁹ and the doctrines of Marsilius,²⁰ Hobbes, Locke, Grotius, Pufendorf, Rousseau²¹ and Rawls.²²

If we join both lines of thinking, we can conclude that the representatives of the Natural Law doctrines could rationally justify the binding force of positive law. The core of their views can be reconstructed as follows: One ought to observe positive law. This concept of "ought" presupposes that some agreement exists between the positive law (not merely legis corruptio) and the Natural Law. Furthermore, this concept of "ought" presupposes that rational human beings in the state of nature would consent to obey the positive law. Finally, this concept of "ought" presupposes that the consent is binding (justifiable by the idea of suum) but, we may ask, presupposes this for whom and when? The supporters of Natural Law tend to make these presuppositions analytic (or synthetic a priori) in all interpretations and for all people or, in the case of "natural law with a changing content"²³, at least for all members of this society now. In actual practice, however, these presuppositions are analytic (or synthetic a priori, if synthetic propositions a priori exist, cf. section 3.2.1. infra, item 6) in some interpretations only and for some people only. In this society now, some people use the language that makes these presuppositions analytic, others use another language. For example, some people accept and others reject the thesis that if N is valid law then N cannot be entirely immoral. Consequently, inferences based on such propositions are transformations. See section 3.2.1. infra. The Natural Law doctrines are too strong because they overlook this crucial point of relativity.²⁴

1.4.3. Validity of the Highest Legal Norms and Legal Positivism

The idea of Natural Law is unacceptable to legal positivists. Let us consider the following from among many positivistic ideas: (1) The whole system of legal norms might be systematically immoral¹ and yet consist of valid law. (2) One ought to observe even norms belonging to such a systematically immoral system from the legal point of view, cf. section 1.4.10. infra.

The controversy between Natural-Law doctrines and Legal Positivism is concerned mainly with entire legal systems, not with isolated legal norms. Many adherents of Natural Law would accept the idea that some norms taken singly are immoral and yet legal, since created in accordance with higher legal norms. But what gives the entire legal system the validity-creating "force"? If the validity of legal norms is derivative, and if it cannot be derived from morality, from what, then, can it be derived? The standard positivistic answer is: from the sovereign power which can enforce the law. One can mention the Sophists² and Ulpianus: quod principi placuit, legis habet vigorem.³ Within the framework of Natural-Law doctrines, this connection was emphasized also by Hobbes.⁴ Systematic Legal Positivism is, nevertheless, comparatively new; the term "philosophy of positive law" was first used by Gustav Hugo in 1798.

According to Bentham and Austin, the law consists of commands of the habitually obeyed sovereign, ensured by the threat of punishment. Its existence as "law" entails no moral justification at all.⁵ On the other hand, according to German Legal Positivism, the positive law has binding force by virtue of the will of the state.⁶ For instance, Bergbohm held that the material source of positive law consists of the legal consciousness (an influence of Savigny and Hegel) and its formal source of the will of the state.^{7,8}

The German Legal Positivism encounters two further problems. First, one cannot with ease define precisely "the will" of such an abstract entity as a state.⁹ Second, entities such as the "sovereign" and the "state" are legal creatures; how, then, can existence of the state and the sovereign make the law binding if they are themselves made by the law?¹⁰

Hart resolved these problems by presenting the following theory: The law consists of primary rules which establish obligations (see section 1.2.3. supra on regulative norms) and secondary rules of adjudication (that is, the rules concerning judging and law-enforcement,¹¹ see section 1.2.3. supra on competence-norms). In addition to the primary and secondary rules, a "rule of recognition" exists which enumerates the various sources of law and prescribes "the criteria by which the validity of other rules of the system is assessed". The rule of recognition derives from the factual, social practice of officials who recognize the law. At the same time, it is the part of the constitution, that is, the part of valid law. In brief, the socially accepted norms declare both other norms and themselves to be valid law.¹² No necessary conceptual link exists between the law and morality.¹³ The basis of legal validity consists in the factual existence of the social practice

determining the rule of recognition, not in moral evaluations. This form of the separation of law and morals makes it possible to "preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny."¹⁴

One may, however, criticise Hart's theory on three grounds:

1) "As the common terminology of legal and moral discourse indicates, the elements of moral and legal reasoning share a common framework even though they have considerable differences of internal detail. This means exactly that there is at least one necessary conceptual link between the legal and the moral, namely that legal standards and moral standards both belong within the genus of practical reasons for action, whatever be their weight as such."¹⁵

2) The social practice alone is not a sufficient condition of the law-character of a normative system (see supra section 1.3.5.). One cannot regard the Mafia's "constitution" - perhaps also self-referring and recognized by the members of the organization - as valid law.¹⁶

3) This fact does not exclude the possibility of moral scrutiny of law. The "legal ought" is evaluatively coloured but not identical with the "moral ought" (see infra section 1.4.10.). The authority of social practice matters more in the legal than in the moral discourse whereas justificatory force of substantive reasons matters more in the moral discourse but should not be ignored in the law either. In fact, the relative importance of social practice is greatest as regards the first and the relative importance of evaluative reasoning as regards the third of the following stages of the contextually sufficient legal justification: (a) the establishing of the law-character of a normative system as a whole; (b) establishing legal validity of the sources of the law in this system; (c) establishing the content of legal norms. See infra sections 2.2. and 2.3.

It is not clear how one can justify the inference from such propositions as "there is a social practice of acceptance of the basic norms of the normative system N", "N fulfills the criteria of law formulated by itself", or "N expresses the will of the state" to the propositions "N ought to be observed", or "N is valid".¹⁷ This inference is perhaps analytic (or synthetic a priori) to some persons and under some interpretations, but certainly not to all persons under all interpretations; see infra section 3.2.1. Legal Positivism thus refutes theories presented by the Natural Law doctrines which were too strong but Positivism itself presents another too strong theory.

1.4.4. Negation of the Legal Ought by Legal Realism

1.4.4.1. Consequences of Hägerström's Ontological Views

"Legal Realism" rejected the too-strong theories of derivative legal validity (and hence of the "legal ought") presented by the Natural-Law doctrines and by Legal Positivism. Legal Realism, however, presented no theory at all; instead, it denied that a problem existed. From the beginning of the Twentieth Century, Legal Realism presented itself in many countries¹, especially in the United States and Scandinavia. Let us deal with one line of its evolution, the Scandinavian, from Hägerström to Olivecrona and Strömberg. The original impetus for this version consisted of Hägerström's antimetaphysical ontology, built up around the following theses: All knowledge concerns something and presupposes reality.² Only one reality exists, and it includes material objects and mental processes. Material objects exist in time and space. Mental processes exist because they are experienced by organisms existing in time and space. Time and space are objective. What cannot be placed in time and space does not exist.³ Propositions about values, validity, rights, the legal ought, the binding force of the law, and so on, not referring to anything extant, have no truth value.⁴

The validity of this ontology is controversial. Any ontology presupposes a background theory that defines the concept "real".⁵ If the background theory is based on common sense and ordinary language, then it is vague and admits of many interpretations and many ontological consequences. Among many ontological doctrines, two at least must be taken seriously. One of them is Hägerström's, the second one admits such institutional facts as chess, money and state, which are definable only by reference to some norms, such as chess rules and legal norms.⁶ (The validity of these norms might presuppose institutional facts; a problem thus arises as to how to avoid a vicious circle.) One may perhaps single out distinct but related senses of "real". Hägerström's reality is real in the strongest sense, institutional facts in a weaker sense.⁷

One might expect that Hägerström's ontology would lead to a revolution in the study of law. Indeed, Olivecrona later maintained the position that whoever says something about valid law cannot be speaking the truth; the truth is reserved for propositions about reality in Hägerström's sense. He can merely talk correctly or not, from the point of view of the legal ideology.⁸ However, Olivecrona permitted the use of concepts such as "valid law" and "rights" in legislation, legal practice, and legal dogmatics (cf. Ch. 7) and emphasized that their use in these contexts had beneficial social effects.⁹

Strömberg has also admitted the great role of competence-norms and qualification-norms, concepts far distant from Hägerström's ontology.¹⁰ Only in legal theory was the metaphysical nature of legal concepts and norms to be emphasized.¹¹

Legal Realism, in the version discussed, created an unbridgeable gap between study of law and legal philosophy: A lawyer was thereby encouraged to use such concepts as "valid law", because this was deemed to be socially beneficial; a legal philosopher, meanwhile, maintained that their use was objectionable. Professional frustration resulted¹², leading to a retardation of legal dogmatics, quite independent of the truth value of Legal Realism.

1.4.4.2. Predictionism¹

Most Legal Realists, however, used such ontological assumptions as a basis for suggesting changes in the legal ideology. Let us give one example. The ordinary, derivative, use of the word "valid law" is incoherent in the context of the "Legal Realist" ontology. This is one of the reasons why the "realistically"-oriented literature in jurisprudence often rejects this use of the word "valid law" and replaces it with predictivism: "The doctrinal assertion that a certain rule is valid....law is, according to its real content, a prediction that the rule will be applied in future legal decisions."²

One can criticize predictivism in the following ways:

1. While the predictivist theory - to some extent - fits the practising attorney's conception of valid law, it does not accord with the judge's conception. "The courts consider themselves to be adjudicating in accordance with valid law, but they cannot very well regard themselves as adjudicating according to the way in which they themselves adjudicate; the law would then not be giving them guidance."³ For that reason, Ross, the greatest Scandinavian predictivist, has merely required that the legal researchers, but not the judges, adopt predictionism.
2. Let us suppose that a statute comes into force as of January 1, 1982. A legal scholar could then forecast on December 31, 1981 that the statute will be applied by the court during the year 1982. What grounds has he for making this prediction? As a rule he does not, of course, carry out any detailed sociological investigations concerning the probability of the future implementation of the statute.

He is not a "robust predictivist" but a "mild" one.⁴ The main basis of his prediction that the statute will be applied is usually the very fact that it is valid. According to Ross, the proposition that the rule will be applied means, among other things, that judges will consider themselves bound by this rule and that this rule will be an essential part of their ideological reasoning.⁵ The statute will be applied because it is valid. It requires quite complex analytical tools (ad hoc!) to allow one to say at the same time that the statute is valid because it is applied. Moreover, the predictivist must resort to this ideology in order to say what he means by the courts, about whose activity he makes predictions. Otherwise, he would be forced to argue in a circle and to say "valid law is valid by virtue of its connection with the courts, and the courts are courts owing to their connection with valid law".

3. One can consider some legal rules to be valid even though no grounds exist for expecting them to be applied in the courts. In Sweden in 1940 (and in Finland even later) the Criminal Code still contained Ch. 7 on the breaking of the Sabbath. In England it is customarily said that while such obsolete rules are not applied by the courts, they are nevertheless valid.⁶ One can also conceive a contrary situation. During the second world war the courts of a number of countries were compelled to apply rules which were forced on them by the occupying power. After the war, however, it was decreed that these rules were never valid law, not even during the period in which they were applied. In order to save his theory, in such cases, a predictivist must either invent ingenious semantical tricks ad hoc, or stipulate that lawyers should change their use of the concept "valid law".^{7,8}

1.4.5. The Weakness of Strong Theories

All of these theories are unsatisfactory, because they are too strong. Natural Law doctrines looked for an analytic (or synthetic a priori) step from theses about natural law, morality, or justice, to the thesis about the "legal ought". Legal Positivism looked for an analytic step from theses about the will of the state, the existence of social practices determining the "rule of recognition", and other non-moral criteria of law, to the thesis about the "legal ought". Legal Realism looked for an analytic step from the concept of reality to the conclusion that there is no "legal ought". Such

steps, however, are neither analytic nor synthetic a priori for all people and in all interpretations.¹ We need a much weaker theory. Before that, however, some remarks must be made about Kelsen's ideas.

1.4.6. Kelsen's Views. The Grundnorm 1 (Apex Norm)

According to Kelsen, the highest legal norms must derive their validity from the Grundnorm; (in our terminology this is the Grundform 1, the apex norm).¹ One can formulate the Grundnorm 1 as follows: the constitution ought to be observed² from the legal point of view.³ The apex norm in itself is not valid in the legal sense because it has not come into existence in a legally prescribed way. It is only conceptually presupposed by anyone engaged in discourse about valid law. ("If the law became something that people were not obliged to obey then it would no longer be the law."⁴) Only "if the Grundnorm... is presupposed, can the constitution...be recognized as binding legal norms."^{5,6}

Kelsen has always regarded the Grundnorm as a presupposition. One must, however, distinguish this view from another view, sometimes suggested by Kelsen, according to which the Grundnorm is a hypothesis.^{7,8}

After 1962, Kelsen interpreted the Grundnorm as a fictitious norm presupposing a fictitious act of will creating this norm.⁹ I will return to the problem of hypothesis but not to the question of fiction.

1.4.7. The Grundnorm 2 (The Basic Norm)

In Kelsen's opinion, one can (not "must") always assume the apex norm when the majority of the rules which can be held legally valid on the basis of this apex norm are successfully applied by a power-exercising organization. In my opinion, however, this condition for presupposing the Grundnorm is too weak. So let us introduce the following conditional rule: If a number of social facts exists (F_1-F_n) and if certain normative and/or evaluative requirements are fulfilled, then the constitution ought to be observed from the legal point of view.¹ This is the Grundnorm 2.

The "ought" of the criteria of law (and - if there is such a thing - "the ought" embodied in certain institutional facts F_1-F_n), is different from "the ought" of the conclusion. This "ought" is moral, political, and unspecifically related to "the good", but not legal.² For that reason, the

Grundnorm is necessary in order to organize the following ideas into one coherent³ theory: (1) Legal validity is consistently derivative. One can trace it to the Grundnorm 2 and through it to moral values whose moral validity is not derivative but intrinsic. (Remember the values in the antecedent of the Grundnorm 2). (2) Legal validity, and the legal ought, is, nevertheless, not identical with moral validity, inter alia because the Grundnorm 2 puts moral demands on the constitution only, and through it on the legal system as a whole, whereas a single legal norm, belonging to this system, might be immoral and still legally valid, although one can eliminate it by means of interpretation (section 2.3.8.).

One can consistently speak about valid law and yet not assume the Grundnorm 2. It is linguistically possible for one to assume that the law does not possess validity at all or that validity is nothing more than efficacy of legal sanctions, but no such view is supported by reasons strong enough to regard it as "the correct" interpretation of the contested concept "valid law".

1.4.8. Presupposed Grundnorms and Justified Grundnorms

According to many writers of the Kelsenian tradition, once one has presupposed the Grundnorm, the stage is set for using it as a "ground" for legal validity. But how can a mere presupposition constitute a ground for legal validity? According to Alchourrón and Bulygin, the Grundnorm is a conceptual rule (a definition) regulating the use of the concept (or the term) "valid law" and is thus incapable of establishing the competence of the first legislator.¹

This is, however, only one sense of the Grundnorm: a presupposed norm. I will indicate this sense by using the letter A: Grundnorm 1^A and Grundnorm 2^A. Another sense is: a justified and justifying norm.

To the presupposed Grundnorm 1^A, "the constitution ought to be observed from the legal point of view", corresponds the identically-formulated justified and justifying Grundnorm 1^J.

In the same way, the Grundnorm 2, "if a number of social facts exists (F_1 - F_n) and if certain evaluative and/or normative requirements (W) are fulfilled, then the constitution ought to be observed from the legal point of view", can be either presupposed (Grundnorm 2^A) or used to justify the law (Grundnorm 2^J).

The Grundnorm 2^J justifies the Grundnorm 1^J, and through it justifies the law.^{2,3}

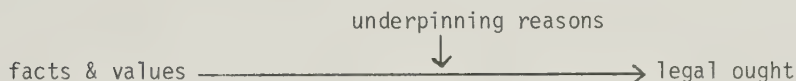
1.4.9. The Status of the Grundnorm 2^J and of the Category-transformation

The Grundnorm 2^J is a transformation rule. It regulates an aspect of the transformation into law, that is, the category-transformation. It is a transformation-rule because (1) it is an inference-rule, and (2) it is non-analytic; it regulates a non-deductive step. The conclusion "the constitution ought to be observed from the legal point of view" does not deductively follow from the premise "there is a number of social facts and non-legal values". A "jump" occurs from the "is" (Sein) and the non-legal "ought" (Sollen) to the legal "ought".^{1,2}

The Grundnorm 2^J can be either established (that is, socially existing) or constructed ad hoc. In either case, it can justify the law only because it can be itself justified ("backed") by some underpinning reasons.³ These reasons can be factual or evaluative, expressing the "non-legal ought". Only after one has justified, and not merely presupposed, this Grundnorm, is the stage set for one to use it as a ground for legal validity.

Here we arrive at the following formulation of the Grundnorm 2^J: On the basis of the underpinning reasons (U_1-U_n) the following rule is sound: if a number of social facts exists (F_1-F_n) and if certain normative and/or evaluative requirements (W) are fulfilled, then the constitution ought to be observed from the legal point of view.

Briefly and schematically:



In section 5.2.2. I will argue that on the basis of social practice, one can construct a "higher-grade" norm- and/or value-system, to which both the justifying Grundnorms 1^J and 2^J and the underpinning reasons themselves belong. One can call this norm system a "legal ideology".

Legal ideology includes the doctrine of the sources of the law.⁴ One can also interpret Lachmayer's "pre-constitutional customary law" as belonging to it.⁵ How important is this social character of the Grundnorm? It matters very much if the Grundnorm is interpreted as an inference rule (Grundnorm 2^J). An inference rule is more valuable if it is socially established. On the other hand, the social character is utterly unimportant, if one takes the Grundnorm as a transcendentally necessary presupposition (Grundnorm 1^A or 2^A). An ordinary lawyer, as well as Kelsen himself, would presuppose the apex norm "the constitution ought to be observed" even were

there no established social norms other than the law valid in a given time and place.

Legal ideology provides an established list of underpinning reasons in favour of the Grundnorm 2^J but this list is open. One may always invent additional reasons. Moreover, reasons sufficient at a given time can become insufficient at a later time, when a society has changed very much.

What facts and what values are indicated by this Grundnorm 2^J, justifying the law? They are in principle the same facts and values as serve identifying criteria of the law, and the same facts and values as those to which the presupposed Grundnorm 2^A refers.^{6,7}

1.4.10. The Legal Ought and the Moral Ought. The Legal Point of View

Contrary to what Legal Realism and Legal Positivism assume, the concept "valid law" presupposes the claim that the law is to be justified, and cannot be systematically immoral. Contrary to what the Natural-Law doctrines assume, this concept presupposes only a vague claim to moral justification, not clear moral standards. Moreover, the concept "valid law" merely presupposes that each legal norm belongs to a normative system which one can morally justify by and large. This presupposition corresponds to a justification: it is morally better for a society to establish an institutional legal order which leads sometimes to morally wrong conclusions, than to force societal actors to (autonomously) evaluate, without legal help, all the complex situations arising in a modern society. Because of human limitations, the second alternative would lead to less certainty, less consensus, more violence and less efficiency. The institutional legal order is especially valuable from this point of view when it not only contains enacted laws but also established patterns of legal discourse and possibility of judicial discretion in the cases in which not even optimal legal discourse solves all social conflicts.¹ Each legal norm, regardless of its content, is thus morally justified in the following weak sense: it belongs to an order of the discussed kind and any such order is prima facie morally better than no such order at all.² (To prove that a given concrete legal order is morally better than another legal order, is an entirely different matter.³) Consequentialist moral reasoning thus justifies limitations on autonomous morality in favour of institutionalized law.

These reflexions elucidate the sense of our central assumption that the law ought to be observed from the legal point of view. Suppose the statement:

"the norm n ought to be observed". One can interpret this statement in many different manners. Inter alia, the following interpretations are possible:

1) It is morally better to observe n than to violate it. One thus ought to observe n from the moral point of view.

2) One ought to observe n from the legal point of view.⁴ This expression presupposes two things: a) One has performed a contextually sufficient legal justification of n , in view of the legal transformation norms; and b) One can perform a deep justification of n , that is, show, what follows: Violation of n would weaken the existing order of the above-mentioned kind without replacing it with a kindred order, and any such order is morally better than no such order at all. If the considerations about the legal order as a whole are disregarded, it need not be morally better to observe n than to violate it.^{5,6}

Everybody, a lawyer or not, who reasons morally in an optimally rational manner (see infra Chapters 4 and 5) must find out, what follows: If one acts as a lawyer, one ought to reason from the legal point of view. A judge ought to do it because he makes legal decisions. A legal scholar ought to do it because he helps the judge. An attorney ought to do it because he is engaged in a rational discourse with the judge.

1.4.11. How Many Grundnorms 2^J ?

The number of Grundnorms 2^J depends on the legal system. If its hierarchy of laws (Stufenbau) is perfect, one need perform only one category-transformation. Everything else that can be said about the "legal ought" one can derive - deductively or via a justifiable transformation - from a set of premises one of which is a legal norm. Statutes, and, in Common Law countries, precedents, thus express the "legal ought" since they fulfill certain conditions laid down in the constitution. The hierarchy can, however, be imperfect, e.g. if one admits that an "original" law or decision might create the "legal ought" without constitutional authorization. Another example is the fact that legislative preparatory materials, see infra 2.2.5., may create the "legal ought" even if no conclusion about their role follows from the constitution, either deductively or via a transformation. More category-transformations are then required, each corresponding to a separate Grundnorm 2^J , one attached to the constitution, another to "original laws", a further one to preparatory materials, etc. These Grundnorms are, however, interrelated. Among other things, the extra-constitutional sources do not create the "legal ought" if they are incompatible with the constitution.¹ From this point of view, the separate Grundnorms 2^J are reducible to only one, whose content is as follows: If a number of social

facts exists (F_1 - F_n) and if certain normative and/or evaluative requirements (W) are fulfilled, then 1) the constitution ought to be observed from the legal point of view, and 2) the "original" laws and decisions (if any), created in the way P, ought to be observed from the legal point of view unless they are incompatible with the constitution. But to gain knowledge whether they are thus incompatible, one needs interpretation of law, involving the transformation inside the law.²

1.4.12. Transformations in the Law and Identity of a Legal Order

The transformation into the law is a transformation into a definite legal order such as Swedish law. What norms belong to one and the same legal order?¹

1. One might say that a legal order "consists of the first constitution and all the laws created, directly or indirectly, by exercise of powers conferred by the first constitution."² This criterion of identity, however, is insufficient, because a legal order can contain norms which have not been created according to the constitution.
2. One may argue in the alternative that a legal order is identified by recourse to one and the same Grundnorm.³ A presupposed Grundnorm (see supra sections 1.4.6.-1.4.8.), however, cannot serve as an efficient identity criterion. One adapts the presupposed Grundnorm to one's views about the law, not another way around.⁴ A justified Grundnorm could serve the purpose of identification but may be indeterminate due to its connection with the transformations, see section 1.4.11. supra in fine.
3. One may argue further that a legal order contains the laws recognized by an organ authorized to decide whether the use of force in certain circumstances is permitted by the law.⁵ This criterion is also insufficient. The organ requires criteria of its own identity, as well. There is not a single organ but a complex system of legislative agencies, courts, etc. The clearest identity criterion of this system consists of its relation to the legal order. One thus circularly traces the identity of a legal order to the identity of organs, and the identity of the organs back to the identity of the legal order.
4. One might relate the legal order to a given territory.⁶ But this relation is itself complex. Two separate and independent orders may simultaneously be generally regarded as (valid) law in one territory.

For instance, Catholicism has public functions in some countries; the state has its legal order, the Church another. In wartime and under enemy occupation, too, two competing legal orders may coexist within one territory.

5. The best argument is as follows: one legal order has a common language, professional rules and legal method; many mutual references between its norms; many "operative connections" between interpretation of its various norms; finally, many other relations between its norms.^{7,8}

A legal order thus has no single criterion of identity (unity) but many intertwined criteria, all relevant, none necessary and none sufficient. In deciding whether two legal norms belong to the same legal order or not, one is apt to encounter uncertainties, and one must often rely on a transformation.

A special problem occurs in connection with our thesis that law-character of a legal order, and legal validity of its norms, depends not only on factual criteria but also on the fact that this order does not contain or generate too many grossly immoral norms or practices. Cf. sections 1.3.5., 1.4.7. and 1.4.10. supra. Assume that two clusters of norms in a given territory fulfil the factual criteria of law. Cluster 1, including mostly penal law, contains "too many" grossly immoral norms. Cluster 2, including mostly private law, is not systematically immoral in this sense. Assume, now, that these clusters jointly constitute one legal order. One must then evaluate the degree of immorality of this order as a whole. If it contains too many grossly immoral norms, then the whole order, including Cluster 2, is not legal, and its norms are not legally valid. But this conclusion contradicts other data. Assume thus that Cluster 2 is systematically used in many contracts and other transactions. People buy and sell things, and define "buying" and "selling" in relation to Cluster 2. To deny the law-character of this cluster would imply nothing less but the conclusion that these people "actually" do not "buy" or "sell".⁹ But it is absurd to say that good private law is no law, and good sale-purchase is no sale-purchase just because another cluster of norms (Cluster 1), regulating entirely different matters, is immoral. The relatively best way out of this dilemma is to say that Cluster 2 is a legal order while Cluster 1 is not. The assumption that these clusters jointly constitute one legal order must be refuted. Immorality of a part of an alleged legal order destroys unity of this order.

1.5. THE FIRST CONCLUSION

Let us now see the simplicity behind the complexity: The thesis that a given norm is legally valid presupposes¹ that it ought to be observed from the legal point of view and belongs to a normative system whose highest norms ought to be observed from the legal point of view. Moreover, one needs both evaluative and factual considerations in order to justify this thesis, and one needs to take non-deductive steps.

Let us add that one can grade the role of moral evaluations in this context. An immoral norm of course ought not to be observed from the moral point of view, yet one may have a legal obligation to observe it. An interpreter of law then ought to adapt this norm to moral evaluations, see infra section 2.3.1. Any degree of immorality of a legal norm justifies its corrective interpretation. A high degree of immorality of the norm justifies an interpretation which entirely eliminates it from the legal order, see infra section 2.3.8. A still higher degree of immorality of the norm may justify civil disobedience. An extremely high degree of immorality of many legal norms, or a very high degree of immorality of very many legal norms, justifies the conclusion that the normative order as a whole is not a legal order at all. This conclusion may justify a revolution.

2. TRANSFORMATION INSIDE THE LAW. CONTEXTUALLY SUFFICIENT LEGAL JUSTIFICATION

2.1. GENERAL REMARKS ON THE TRANSFORMATION INSIDE THE LAW¹

The transformation into law, based solely on non-legal premises, assigns the law-character (including the quality of "legal ought") to a norm-system as a whole; furthermore, it assigns legal validity (again, including the quality of "legal ought") to its constitution, and perhaps to some other sources; these sources can be valid independent of the constitution but the constitution can of course eliminate their validity. One must, however, add another transformation. Transformation inside the law occurs when one performs a transformation in order to derive a conclusion concerning (valid) law from a set of premises at least one of which expresses or mentions (valid) law.

Legal reasoning contains many types of transformation inside the law. I will discuss only three.

1) A non-deductive step may be needed to derive a conclusion about some sources of the law (for instance precedents) from other sources of the law (for example the constitution). This is the transformation constituting sources of the law, or the source-transformation.

2) A non-deductive step may be needed to derive a non-written legal rule or principle from the sources of the law. This is the transformation constituting a general norm, or the general norm-transformation.

3) A non-deductive step may be needed to derive a concrete legal judgment² from the sources of the law and the non-written legal rules and principles. This is the transformation constituting an individual norm, or the individual norm-transformation.

The following is a simple model of legal transformations:

$$p \ T_1 \ q \ T_2 \ r,$$

where

p = facts and non-legal values;

T_1 = transformation into the law (with two aspects: T_1^1 = category-transformation, and T_1^2 = criteria-transformation);

q = legal validity (law-character) of the norm-system as a whole, of its constitution, and of some independent sources of the law;

T_2 = transformation inside the law, that is T_2^1 (the source-transformation), T_2^2 (the general norm-transformation) or T_2^3 (the individual norm-transformation);

r = legal validity of other sources of the law, of non-written (valid) legal rules and principles, and of concrete statements expressing the "legal ought".

2.2. SOURCES OF THE LAW

2.2.1. Types of Reasons in the Law. The Sources of the Law

2.2.1.1. On Substantive Reasons and Authority Reasons

Legal reasons are either substantive reasons or authority reasons.¹

Substantive reasons are moral, economic, political, institutional, or other social considerations utilized to support a conclusion of a line of legal reasoning.²

Substantive reasons are either goal or rightness reasons. "A goal reason derives its force from the fact that, at the time it is given, the decision it supports can be predicted to have effects that serve a good social goal."³ "(A) rightness reason draws its force from the way in which the decision accords with a sociomoral norm of rightness as applied to a party's actions or to a state of affairs resulting from those actions."⁴

MacCormick maintains that the core of legal reasoning consists of the fact that judges evaluate the consequences (i.e., both implications and outcomes) of rival possible rulings.^{5,6} But this does not mean that all substantive reasons are goal reasons. One can use rightness reasons to spontaneously evaluate the sources of the law themselves, without computing the consequences. An additional complication occurs because such terms as "consequentialist reasoning", "consequence-oriented decision-making",⁷ "goal-reasoning", "teleological reasoning", and so on, in ordinary legal parlance refer to the situation where one judges a decision according to whether or not its causal results correspond to accepted social goals. MacCormick's consequential argument is more broadly defined: it includes evaluation of logical consequences, not only causal results, and the yardstick of evaluation consists of coherence not only with goals but also with other principles, rules, and concrete evaluations.

The justificatory force of authority reasons is based not upon their

content but upon other circumstances⁸, for instance upon the fact that a court has previously employed them to settle a dispute. An authority reason may also be substantive. A lawyer may, for example, proffer the reason previously employed in a court without reference to the prior judicial usage, in which case his use of the reason is substantive only.

2.2.1.2. The Concept "Sources of the Law"

All legal reasons are sources of the law in the broadest sense. Institutional legal authority reasons are sources of the law in a narrower sense.¹ Mandatory sources (see below) are sources of the law in the narrowest sense. Most of the sources are written but some are not (e.g., some forms of custom).

Primary sources of the law can be identified and provided with the "legal ought" through a reasoning process involving no other sources of the law. Most sources are, however, secondary; they can be identified and provided with the "legal ought" only by considering other sources of the law.²

2.2.1.3. The Hierarchical Model of the Sources of the Law

One model describing the system of the sources of the law, universally¹ applicable to modern legal orders, states which material one must, should, or may cite in that part of a judicial decision that is devoted to legal questions. This model implies that a prima facie hierarchy of the sources of the law exists, constituting a starting point of legal reasoning: "must-sources" precede "should-sources" which precede "may-sources". The "higher" sources are considered to be stronger reasons than are the "lower" sources², but many cumulated weak reasons often take priority over fewer strong ones.³ Consider examples discussed infra in section 2.2.2.

The model discussed is a mere idealization.⁴ One can elaborate much more complex classifications of the sources of the law. Moreover, only vague definitions of the "must-sources", "should-sources" and "may-sources" of the law are universally acceptable. Precise interpretation of these concepts varies from one legal order to another⁵, from one part of a legal order to another and from one time to another; moreover, different people can suggest different precise interpretations. Consequently, a list of material which must, should or may be taken into account also varies. In Sweden, for example, the list contained in the international private law differs from that found

in the rest of the legal order.⁶

2.2.2. Must-sources, Should-sources and May-sources of the Law. Authority of Substantive Reasons

1. Decisionmakers must use statutes and, in Common Law jurisdictions, precedents, in order to justify judicial decisions. I use the term "must" in a normative sense. In other words, statutes and precedents constitute formally binding (valid) law.

In Swedish law, the following source-norm is acceptable:

(S1) All courts and authorities must use statutes in the justification of their decision, if any are applicable. The Labor Court must in addition take into account applicable collective agreements. In some decisions concerning taxation law, the adjudicatory body must consider applicable instructions given by the National Tax Board.¹

2. Some other, "weak", sources (e.g. precedents in the Continental law) are not formally binding, but they still belong to the class of considerations which should be used in the justification of judicial decisions; justification of a decision is invariably weakened if they are disregarded.²

A source-norm for the Swedish Law:

(S2) All courts and authorities should use applicable precedents and legislative preparatory materials to justify their decisions. In some cases they should pay attention to custom.³ In most types of decisions concerning taxation law, the adjudicatory body should consider applicable instructions given by the National Tax Board.⁴

This list sometimes changes. In the Sweden of 1960, for example, one could not be certain whether legislative preparatory materials were to be counted as should-sources or may-sources.⁵

The legal duty to use should-sources to justify judicial decisions is weaker than the corresponding duty to use must-sources. Reasons strong enough to justify disregarding the should-source may be weaker than those required to justify disregarding must-sources.⁶ The duty to use should-sources is weak also in that the legal consequences of disregarding them are usually milder. This distinction is, however, difficult to state precisely. For instance, in Swedish law as of 1974, an official's failure to take into account must-sources was a ground of criminal prosecution; his failure to use should-

sources, however, had no criminal consequences.⁷ In Swedish law as of 1983, the criminal charge applies only to the intentional or grossly negligent disregard of a must-source. Ordinary negligence is not criminal. The legal consequence of disregarding should-sources consists mainly of the risk of the decision's cancellation. In Sweden, the state may also be liable in tort should its agent negligently disregard a should-source.⁸

"Must-sources" and "should-sources" can jointly be called "mandatory" (in the broadest sense of the word) sources of the law. Whoever disregards them, has the burden of argumentation.

3. One may use still other sources, such as legal textbooks and foreign cases to justify judicial decisions.⁹ They usually strengthen the justification. In any case, their use is neither prohibited nor damaging to the professional reputation of one using them.

All established evaluations (proffered as substantive reasons) are (may-) sources of the law¹⁰, because their justificatory relevance depends not only on their content but also on the fact that they are established. The list of these sources is open. It is easier to say what sources may not be used in the justification of judicial decisions. For instance, a judge may not pay regard to wishes for his family, friends, colleagues or fellow party members, but even this list varies¹¹ with time, space, subject-matter, audience, etc.

A source-norm for Swedish Law:

(S3) All courts and authorities may use, inter alia, the following material to justify their decisions:

- a) Custom (but see also S2).
- b) Swedish judicial and administrative decisions which are not reported in the leading law reports, NJA (and therefore do not have the same standing as the precedents published in NJA).
- c) Precedents and legislative preparatory materials which do not directly touch upon the interpreted legal text but which give information on evaluations in adjacent areas of law.
- d) Draft statutes, repealed statutes¹², foreign statutes, and decisions by private or semiprivate organizations such as the Swedish Press Council.
- e) Professional legal literature (e.g., handbooks, monographs etc.).
- f) Private pronouncements by members of the Legislation Draft Committee, members of Parliament, ministers, etc.

One can classify the may-sources in a more detailed manner and thereby reveal more distinctions. The Swedish juristic literature is, for example, perhaps more important for the Swedish courts than foreign decisions.

Some must-sources, for example the constitution, are primary; one can identify them as the law (and ascribe to them the "legal ought") through a reasoning process involving no other sources of the law. One need not quote other sources of the law to argue that the constitution is legally valid. On the other hand, all should-sources and may-sources are secondary. They are identified and provided with the "legal ought" via a complex line of reasoning involving the quotation of other sources. Why may one use text-books in the justification of judicial decisions? Because the practice of the courts allows of it. But why should we follow the practice of the courts? Because it is prevalent in the legal community and because the constitution affords the courts a certain legal position.

Finally, non-established, generated ad hoc substantive reasons are, as regards their content, qualitatively different from authority reasons. But they have their own "justificatory force".¹³ Cf. section 2.3.4. infra.

2.2.3. The Hierarchy of the Must-sources of the Law

The must-sources of the law are arranged in a number of levels, the most notable of which are the constitutional, legislative, and executive. In principle a norm belonging to a given level is legally valid if it has been created in accordance with legally valid norms of a higher level, which determine who is authorized to make the norm and how this should be done.¹

Although some norms on the higher level are decisive for the legal validity of a "lower" norm, others are not. For instance, some procedural norms are decisive, some not. The distinction seems to depend on an open, complex cluster of criteria, meta-norms², or both. These, however, vary from one legal system to another, are never complete, and can always be reinterpreted. The list of the sources of the law is thus only partly established, and partly in a state of continual modification. Since the modifications do not follow deductively from established premises, they involve a kind of source-transformation.

This conclusion is further confirmed by the fact that a norm can acquire or lose its validity because of circumstances about which the established higher norms are silent (the problem of "original laws"³ and desuetudo derogatoria⁴.)

2.2.4. Precedents

2.2.4.1. The Concept "Precedent". Possibility and Rationality of Following Precedents

A precedent is a decision of a concrete case which becomes a more or less authoritative pattern for future decisions. How is it possible for a legal system based on constant copying of old decisions to change? The answer is that only in similar cases do precedents become patterns for later decisions. One may always find differences between the precedential case and the case to be decided.¹

The relevant elements of the precedential case, used as guidelines for the subsequent case, are the ratio decidendi; other elements are obiter dicta. What elements should one regard as ratio decidendi? It depends on a very complex set of practices, determining the reflective equilibrium² of three kinds of reasons.³ First, one may consider reasons adduced by the court in the precedential decision with the aim of justifying the decision and with the belief that they were necessary to justify it. Second, one may consider the reasons estimated as necessary to justify the decision, even if not adduced in the decision (constructed ratio decidendi). Third, one may freely add some other, for instance moral, reasons. This reflective equilibrium varies between different persons, places and times. The accepted technique is to re-explain and re-justify the ratio.⁴ No simple criteria of ratio are thus established.⁵ Following the established evaluations by determining what cases are essentially similar, only helps us to some extent to distinguish between ratio and dicta; although a few guiding principles assist decisionmakers,⁶ this distinction, and, consequently, the formulation of the precedent-based legal rule, involves a transformation.

Within these limits one can follow precedents without precluding change within the law. But should one do so? Precedents promote the uniformity of judicial practice, and thereby promote justice and rule of law. (Still, they are more flexible than statutes.) By following precedents the court can avoid the evaluation afresh of similar cases, which would be unjustifiable from the viewpoint of economy.⁷

Finally, a further argument exists for the following precedents of higher courts: The judges of superior courts are better qualified and more experienced, and their decisions should therefore be a model for lower courts. Anyway, they are likely to reverse the lower court on appeal, if this court does not pay attention to precedents.

2.2.4.2. The Role of Precedent in Sweden¹

Swedish courts regularly follow precedents, perhaps in an ever-increasing dependence.²

An acceptable source-norm for Swedish Law:

(S4) Decisions rendered by the Supreme Court, the Supreme Administrative Court, the Labor Court and the highest special courts such as, for instance, Insurance Court, constitute precedents.

This norm is open: one might use the term "precedent" in a broader sense, to include decisions of other higher courts and even authorities. Precedents are not binding³ but important. Decisions rendered in pleno⁴ have exceptional influence, compared by some authors to the authority of statute.⁵ Moreover, according to the amendments of 1971 to the rules in RB Chap. 54 on appeals to the Supreme Court, the Supreme Court is in principle to act only in cases in which it is important that a general ruling be given by way of precedent for lower courts.⁶

2.2.4.3. Conclusions About Precedents

- 1) The use of precedents involves transformations.
- 2) Still, the role of precedents is important.
- 3) This role is justifiable by recourse to established non-legal values and principles.

2.2.5. Legislative Preparatory Materials

2.2.5.1. The Concept "Legislative Preparatory Materials".

Possibility and Rationality of Following the Will of Legislators

In connection with legislation, preparatory materials are often published, explaining the meaning and the purpose of the statute.

Why are preparatory materials valuable? The answer to this question within contextually sufficient legal justification is "because they constitute a result of legislative work and we usually take them into account". The answer within the deep justification is "because they constitute evidence

of the purpose of the law (ratio legis)."¹ The idea of ratio legis presupposes a "jump": One derives propositions about the ratio from propositions about the will of persons participating in legislation. But the ratio does not follow deductively from propositions about this will; the ratio is, metaphorically speaking, a depersonalized will.²

The idea that the main purpose of statutory construction is to discover the legislator's will was expressed as early as the middle of the 18th century,³ and later by Thibaut, Savigny, Windscheid, and Bierling.⁴ When commenting upon this idea, one must, however, take into account the following problems. (1) We cannot see into the mind of another human being⁵ but we might have good reasons for our guesses about other people's thoughts. One of these reasons is analogy from personal experience.⁶ (2) The subjective construction of statutes must reveal the will of many persons who participated in the legislative work. These persons are not always the same. Nor is their will permanent or unitary.^{7,8} Only the ratio,⁹ derived by "jumps", is. (3) Whereas the law is construed according to the "legislators'" will, the "legislators" are recognized according to the law. A vague idea about the law helps to identify the legislators and their authority. The relation to this authority is a reason for a more precise interpretation of the concept of law.¹⁰ (4) Finally, in some exceptional cases evidence may show that the preparatory materials are not in accord with the legislators' will.¹¹

The following are some reasons for taking preparatory materials into account:

- (1) The authors of the preparatory materials participated in the democratic legislative procedure.¹² Moreover, they were outstanding experts and used much time to prepare their opinion.¹³
- (2) Uniformity of statutory interpretation is promoted if all interpreters take into account the same preparatory materials.¹⁴
- (3) There is no reason to abstain from making use of all the aids which are available, including preparatory materials, especially since the legislator, expecting these materials to be taken into account, formulates the statutes with insufficient clarity.¹⁵
- (4) Were the courts to show indifference toward preparatory materials, they would run the risk that the legislators might restrict the court's competence in the field of statutory construction.¹⁶

On the other hand, the following arguments are among those adduced in support of a hostile attitude towards preparatory materials:

- (1) As a result of binding the courts to the preparatory materials, the power of the courts is unduly restricted and the power of the legislator is dangerously increased.¹⁷ Moreover, the materials are "made" in a less democratic manner than the statute itself.¹⁸
- (2) The materials are sometimes less clear than the statute itself.¹⁹ (At the same time, the legislators feel free to make obscure statutes and to expect that preparatory materials will make them understandable.)²⁰
- (3) The materials are less accessible than the statute.²¹
- (4) The materials cannot be amended afterwards. If one desires to alter legal practice resulting from the preparatory materials, one must amend the text of the statute itself even though the only error is in the preparatory materials.²²

2.2.5.2. The Role of Preparatory Materials in Sweden

In Europe the role of preparatory materials is a comparatively new phenomenon, dating back to the first half of the 19th century.¹ Today, they are used quite frequently, for instance in Germany and Switzerland. According to a traditional view among English legal writers, preparatory materials should not be used at all in statutory interpretation.² In the Nordic countries, especially in Sweden, preparatory materials have in practice greater importance than in other states.³ The position in Sweden is as follows. In some cases the Supreme Court does not consider itself bound by the preparatory materials.⁴ Preparatory materials, nevertheless, play a very great part in the application of law.⁵ The idea that preparatory materials occupy a position as important as that of precedents was formulated by Folke Schmidt in 1955.⁶ Schmidt influenced the subsequent development of the Swedish doctrine of the sources of the law. Some acceptable source-norms concerning legislative preparatory materials in the Swedish law may now be formulated:

- (S5) The following texts constitute legislative preparatory materials: the legislation committee's report, which comprises proposals for the new statute text together with reasons therefor; memoranda and other communications, prepared by a ministry or central administrative agency; statements by bodies and persons invited to submit comments; pronouncements by the responsible minister; pronouncements by the Council on Legislation; bills of the members

of the Riksdag, and opinions of the relevant parliamentary commission.⁷ What is said during plenary debates in the Riksdag is as a rule not taken into account in the same way, because it may contain things said for political advantage.⁸

- (S6) Old preparatory materials should be taken into account to a limited extent only.⁹
- (S7) Consideration should be given, as a rule, only to materials which have been published in printed form.¹⁰
- (S8) Pronouncements in the preparatory materials relating to questions outside the scope of the legislation under consideration should be assigned only limited importance.¹¹ Exceptions: A body undertaking inquiries concerning a number of statutes, may in connection with one draft statute express its opinions about another draft dealt with earlier.¹² Preparatory materials of new statutes can be of some importance in the interpretation of an earlier statute which regulates an adjacent area.¹³
- (S9) Wholly obscure preparatory materials should not be taken into account.¹⁴

Cf. infra (C14) about contradictory preparatory materials.

The use of these evaluatively open source-norms obviously requires transformations.

2.2.5.3. Conclusions About Legislative Preparatory Materials

- 1) The use of preparatory materials requires transformations.
- 2) Still, their role in Sweden is important.
- 3) There can be meaningful discourse aimed at answering the question to what extent this role is justifiable by recourse to established non-legal values and principles.

2.2.6. The Status and the Character of the Source-transformation

How might one know that a given material is a source of law? How might one know which sources of the law must, should, or may be used in the justification of judicial decisions? As regards a primary source, a transformation

into law constitutes both a necessary and a sufficient condition of this knowledge. As regards a secondary source, one needs not only this transformation - establishing a corresponding primary source - but also an additional step from the primary to the secondary source. This additional step is also a transformation if the statement concerning the legal validity of the secondary source does not follow deductively from the primary source.¹ Let us call this step the "transformation constituting the sources of the law", or the "source-transformation". The constitution alone, interpreted in an ordinary-language manner, does not completely identify the sources of the law. Consider, for instance, the question to what extent the detailed rules determining what constitutes relevant legislative preparatory materials might be said to follow from the Swedish constitution. The identification might follow from a combination of the constitution with some (meta-) norms and criteria established within the traditional doctrine of the sources of law. In some cases, however, not even these (meta-) norms and criteria are sufficient. When one makes assignments according to the (meta-) norms and criteria, uncertainties are apt to crop up, and one must decide to which category the source in question belongs.

2.3. GENERAL NORM-TRANSFORMATION AND INDIVIDUAL NORM-TRANSFORMATION

2.3.1. General norm-transformation

A further transformation inside the law results in general norms. It is a transformation constituting general norms, briefly a "general norm-transformation", from the sources of the law to non-written (valid) legal rules and principles. This transformation occurs in the construction of statutes and in the identification of a precedent-rule. One can explain neither of these practices as consisting solely of deduction from the sources of the law; hence a transformation is involved.¹

The general norm-transformation differs from the source-transformation in the following manner: the latter identifies materials such as statutes, precedents, or textbooks which express legal norms or are relevant to their interpretation. It answers such questions as "is this a statute?", "is this a precedent?", and so on. The former informs about the content of this material. It answers such questions as "what does this statute say?"

One achieves a general norm-transformation in two ways: First one adapts the sources of the law, for example, various parts of the same statute,

statutes and precedents, or statutes and might-sources, to each other, thereby playing down inconsistencies between them. Moreover, one makes them more coherent with each other than originally. They thus support each other more than before, and one presents them as supported by general principles. Second, mutual adaptation occurs between the sources of the law and moral evaluations generated by the person performing the transformation.

2.3.2. General Remarks on Individual norm-transformation¹

An inference is a transformation constituting an individual legal norm, briefly an individual norm-transformation, if, and only if, (i) it results in a concrete legal judgment; (ii) among its premises is a general legal norm, either included in the sources of the law, deductively derived from them, or constituting a product of general norm-transformation; and (iii) one cannot deductively derive this concrete legal judgment from only this general legal norm together with a description of the case.

One achieves the individual norm-transformation in the same two ways as the general norm-transformation: via mutual adaptation of the sources of the law and via their compromise with newly generated evaluations.

In sections below, I will exemplify individual norm-transformations. All of these examples have their counterpart in some general norm-transformations.²

2.3.3. Clear Cases and "Hard Cases"

A case is "hard" if the contextually sufficient legal justification of its decision involves reasons other than those referring to the must-sources of the law (statutes and, in the Common Law countries, precedents) and to the description of the case itself.¹ One need not present these further reasons explicitly. It is enough that a lawyer would consider it natural to mention them;² if a philosopher of law alone would think it natural to give reasons other than the wording of the statute or the precedent, then the case is clear, not "hard".

The "hard" cases involve substantive reasons whose character is evaluative. Consider the following case (Germany, VersR 1979,226.) A's car collided with B's moped. B lay on the road and was later run over by C's car. B was taken to hospital, where he died. B's insurer claimed compensation from C and C's insurer, quoting BGB (the Civil Code) § 830(I)(2) - liability in solidum when

it is known which factors have contributed to the injury but unknown as to what extent each has done so. The LG (the District Court) ruled against the plaintiff; the OLG (the Court of Appeals) awarded reduced compensation; the BGH (the Supreme Court) reestablished the first decision. The reasons: BGB § 830(I)(2) is an exceptional norm. Its purpose is to compensate the injured party in uncertain cases where he could otherwise, perhaps, be left without compensation. C's liability for a mere uncertainty, however, is not justified, because A's liability is certain: he made C's action possible and thus - at least indirectly - caused the injury. If he did not kill B directly, he did so via C.

The case is rather complex but one thing is clear: the courts have performed both cognitive and evaluative operations.³ Quoting BGB § 830 is a cognitive operation: one can quote the rule rightly or wrongly. Analyzing causation as such is also a cognitive operation: such propositions as "A caused X" are in principle true or false, albeit they presuppose very complex evaluative premises.⁴ On the other hand, reasoning involving the purpose of a statute presupposes, at least as a rule, evaluative operations; see section 2.3.9.4. infra.

This book concentrates on hard cases, because they pose more important epistemological problems than do easy ones, but what I write below about the quasi-cognitive character of (contextually sufficient) legal justification in "hard cases" one can repeat under the heading "quasi-cognitive character of deep justification in easy cases".

2.3.4. The Role of Substantive Reasons in Legal Justification

In the deep (moral, political, philosophical, not merely legal) justification of legal decisions or of legal interpretation substantive reasons are logically indispensable. Legal decisionmakers need substantive reasons in order to "back" all the transformations in the law, starting with the transformation into law. Inter alia, they need substantive reasons to identify precedents.¹ In legal justification, authority reasons are logically indispensable, because reference to them is a component of the definition of legal justification. Substantive reasons are not logically indispensable in all cases, and are omitted in easy cases. Yet, they are indispensable in legal practice as a whole. Had courts made all judicial decisions without reference to substantive reasons, then the thinking behind them would not have been legal but servile with regard to the power-holders. See infra 3.2.2.

2.3.5. "Free" Schools of Legal Reasoning

Various schools of legal thinking have emphasized the role of substantive ("free" as opposed to "bound") reasons in judicial method. For example: the text of the statute must be taken into account when it is clear (Gény: libre recherche scientifique, free scientific research;¹ Ehrlich, Kantorowicz, Fuchs: Freirechtsschule, free-law school).² When the statute is unclear, the judge should, with the support of other sources of the law, try to establish the value judgments which "formed the basis" of the statute (Gény). Or: he should make his own free judgment and has no reason to conform to such sources as preparatory legislative materials (free-law school). Or: he should make his own preliminary evaluation and adapt it to the statute, the preparatory legislative materials and precedents if, and only if, these sources are completely clear in view of their natural reading, without resort to involved juristic procedures of statutory construction, etc. (Bolding).³ This judicial evaluation is a creative (Gény) and unscientific⁴ choice, not unlike an artist's creativity,⁵ it does not follow deductively from the source of the law,⁶ nor does it constitute an absolute "juridical truth".⁷ It is influenced by one's assessment of various interests,⁸ considerations of social welfare⁹ (Lundstedt, Gény), conceptions of justice (Gény),¹⁰ etc. Some scholars, the most eminent among them Viehweg¹¹ and Perelman¹², emphasized a dialectical and rhetorical mode of legal reasoning.

2.3.6. Application of Law. Types of Individual Norm-transformation. Linguistic and Juristic Interpretation

2.3.6.1. The Concept "Application of Law"

By "application of a legal norm" in the strong sense, I mean that a court or other authority decides a concrete case in accordance therewith. Legal researchers and lawyers "apply the law" only in a weak sense; they do not decide cases, see infra item 7.

Assume, now, that a judge must apply a definite, established, written (e.g. statutory) norm to the case under consideration. The application involves, as a rule, the following operations. (Consider examples given in several sections below.)

I. Interpretation in abstracto.¹ It comprises two operations: 1) establishment of the meaning of the legal norm in the everyday language; 2) general norm-transformation, needed to say something about the special legal

meaning of the norm, its field of application, or both.

II. Implementation of the norm in the concrete case. It comprises five operations: 3) consideration of other legal norms possibly modifying the sphere of application of the implemented legal norm, for instance stipulating some exceptions; 4) establishment of the facts of the case; 5) subsumption, that is, a deductive step connecting the interpretation in abstracto with the decision in a concrete case.² See below section 2.3.7.; 6) qualification, that is, a choice of one of many possible subsumptions; the choice depends on the selection of additional premises; 7) the performative act of decision.³

In most cases of application of law, the decisionmaker performs all of these operations, but not in a predetermined order. The operations influence one another.⁴

2.3.6.2. Types of Application of Law

Application of the law requires an individual norm-transformation.¹ The concept of an individual norm-transformation includes very different things, that is: (i) precise interpretation (literal, extensive or restrictive), (ii) reduction and elimination, (iii) creation of a more general new norm (inter alia, through reasoning by analogy), (iv) qualification and solution of collisions.²

Application of law can be clarificatory (secundum legem) or creative - i.e. supplementary (praeter legem) or corrective - depending on whether the main support for it is provided by the sources of the law or by other reasons.³ Clarificatory application of law often bases on precise interpretation of legal sources and is incompatible with reduction, elimination and creation of a more general new norm. The creative application of law need not necessarily conflict with "the letter of the law". When an application of law so conflicts, it is not supplementary but corrective (interpretatio contra legem). Reduction, elimination and creation of a more general new norm is thus in this sense corrective.

2.3.6.3. Interpretatory Context, Methods, Reasons and Norms

Juridical interpretation differs from interpretation occurring in other disciplines in, above all, the following important respect: Legal ideology,

containing the doctrine of the sources of law, partly regulates the context of juridical interpretation. Legal ideology decides in a specifically legal manner how one should adapt the sources to each other, what established evaluation one should count as a subclass of these sources, and to what extent the interpreter might adapt his results to evaluations he generates ad hoc. In juridical interpretation, e.g. in statutory construction, one uses different procedures, or methods. For instance, one usually distinguishes between linguistic (often called grammatical), logical, systematic, historical,¹ comparative, and teleological construction of statutes. Different methods emphasize the relevance of different kinds of reasons. Some interpretative norms indicate how one should interpret the law. Metainterpretative norms indicate which of the colliding interpretative methods, reasons, and norms one should apply in a given situation.²

Interpretative methods, reasons, norms and metanorms are partly the same partly different in different legal orders, due to the diversity of reasoning tradition, legislative technique, accessibility of statutes, precedents and legislative preparatory materials, and so on.³

We will discuss two kinds of such interpretative norms, quite arbitrarily called interpretation-norms and construction-norms, and one kind of meta-interpretative norms, called collision-norms.

2.3.6.4. Application of Law by the Swedish Supreme Court

The Swedish Supreme Court normally applies the law with caution and depends heavily on the legislative material.

Some remarkable cases of free interpretation, however, have occurred. Examples:¹

NJA 1935, p. 157 and 1938, p. 35. The Court acknowledged an oral contract for the purchase of real estate to have a certain effect notwithstanding that the statute requires a written form if such a purchase is to be valid. Cf. provision JB 1:2 then in force.

NJA 1949, p. 82. In accordance with Chap. 3, sec. 2, of the Act concerning international aspects of marriage, then in force, aliens might only obtain a divorce or separation in Sweden were a reason for this step to be found under both the national law of the spouses and Swedish law. In this case, however, the Court adjudicated a divorce case between two Baltic refugees exclusively in accordance with Swedish, not Soviet, law.

NJA 1949, p. 195. A person was injured by an electric vehicle undergoing

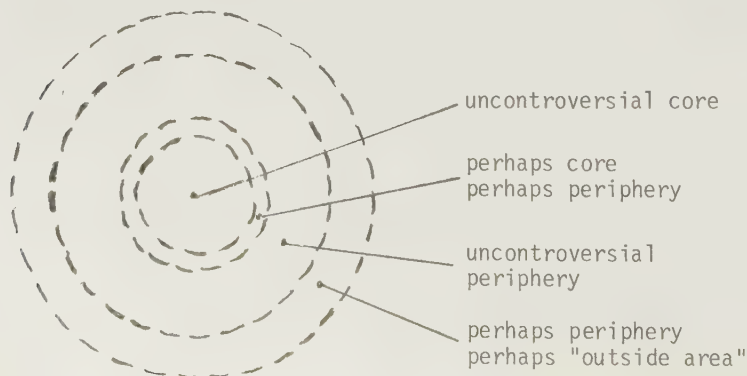
repair inadvertently set in motion by a mechanic. The court of appeal declared that this situation comes under the statute concerning injuries caused by "drivers" and which have "arisen in consequence of traffic" with a vehicle.²

NJA 1951, p. 265. The Court applied the statutory rule concerning the father's contribution to the mother's maintenance in connection with the birth of an illegitimate child to a man who had impregnated the woman, even though the pregnancy had been terminated.

NJA 1966, p. 210. The Supreme Court deviated from general tort principles concerning damage to a third party because the development of the contents of law of torts "in a number of central respects - such as culpa, cause, remoteness of damage, unlawfulness, and what is meant by damage..., must to a large extent fall to the courts."³

2.3.6.5. Transforming the Area of Application of a Norm

The area of application of the legal norms in question established as a result of legal reasoning often differs from the area established by the most natural linguistic, non-juristic reading of the norm. Let us first consider the area of application of the norm established by the latter means. One can distinguish between the core of this area, its periphery, and its "outside area".¹ The border between the core and the periphery, as well as the border between the periphery and the "outside area", is controversial. Hence, one must distinguish between what everybody in all situations recognizes as the core; what everybody sometimes recognizes as the core and sometimes as part of the periphery; what everybody in all situations recognizes as a part of the periphery; and what everybody sometimes recognizes as belonging to the periphery and sometimes as belonging to the "outside area".² The following picture makes it clearer:



Remembering what these four circles designate, let us now add five more circles:



These circles designate the boundary of the application area of the norm established according to:

- 1 - the so-called reduction,
- 2 - restrictive interpretation,
- 3 - literal interpretation,
- 4 - extensive interpretation,
- 5 - creation of a more general new norm, e.g., via conclusion by analogy.

These boundaries are not sharp; the circles are thus only an idealized model.

Reduction eliminates a part of the linguistically-uncontroversial core of the area of application of the norm. Restrictive interpretation embraces all of the uncontroversial core and eliminates all the uncontroversial periphery. Literal interpretation comprises the core and a part of the uncontroversial periphery as well. Extensive interpretation embraces all of the uncontroversial periphery, and, besides, a part of the area which belongs perhaps to the periphery, perhaps to the "outside area". Finally, a conclusion by analogy exceeds the linguistically admissible periphery; in other

words, it comprises a part of the area which certainly belongs to the "outside sphere".

To exemplify these terms, let us invent the following rule: "All chess players are qualified for membership in the club". By literal interpretation one would construe the rule to include all persons who sometimes play chess and no others. By extensive interpretation one would probably construe it to include all persons knowing chess rules. One arriving at a conclusion by analogy would create a new norm, perhaps admitting bridge players, as well. By restrictive interpretation, one might eliminate people who sometimes play chess but have no official rating. A reduction would eliminate everybody but grand masters.

The picture might be further complicated. For instance, an interpretation might be restrictive in one respect and simultaneously extensive in another.

2.3.7. Precise Interpretation and Subsumption

Assume the following general formulation of a legal norm: Cases having the property C are to be normatively qualified in the way R. In symbols: $(x) (Cx \rightarrow ORx)$.¹ A precise interpretation is called for when this norm has already been established - perhaps during the course of the source-transformation or a general norm-transformation - but it is not clear whether this norm is actually applicable to the case under consideration;² in other words, it is doubtful whether a person, an action, or a situation belongs under C or not.³ This may be because C is vague, ambiguous, or open from an evaluative point of view.^{4,5} In these cases the decisionmaker must refer to one of several extra premises. Assume what follows: A statute says that everyone who negligently caused damage should compensate the victim therefore.⁶ A general norm-transformation leads to the following rule: a court will deem the tortfeasor to have negligently caused property damage even if not only his negligent action but also another hypothetical factor would have been independently sufficient to cause such damage.⁷ Now, suppose a notary's negligence caused property damage but this damage could have been caused even had he acted non-negligently.⁸ Is he liable? The judge, performing an individual norm-transformation, answers this question in the affirmative. His reasoning is as follows:⁹

Premise 1, the general norm (x) (Cx $\rightarrow$ ORx):	One negligently causing damage should compensate the victim therefor.
Premise 2, (x) (M ¹ x $\rightarrow$ Cx):	One "causes damage" even if (1) one's actual negligent action is a sufficient but not necessary condition of such damage, and (2) a hypothetical external factor would also be a sufficient condition of the damage.
Premise 3, (x) (M ² x $\rightarrow$ M ¹ x):	<u>If</u> (1) an actual negligent action by a person is a sufficient but not necessary condition of such a damage, and (2') a hypothetical non-negligent action by the same person would also be a sufficient condition of the damage, <u>then</u> the following situation exists: (1) one's actual negligent action is a sufficient but not necessary condition of such a damage and (2) a hypothetical external factor would also be a sufficient condition of the damage.
Premise 4, M ² a:	A notary's actual negligent action was a sufficient but not necessary condition of a damage. His hypothetical non-negligent action would also have been a sufficient condition of the damage.
Conclusion, ORa:	The notary should compensate the victim for the damage.

One can construct a whole chain of such premises which jointly make a transformation into a deductively-complete line of reasoning. In symbols:¹⁰

- (1) (x) (Cx $\rightarrow$ ORx)
- (2) (x) (M¹x $\rightarrow$ Cx)
- (3) (x) (M²x $\rightarrow$ M¹x)
- .
- .
- .
- (4) (x) (Sx $\rightarrow$ Mⁿx)
- (5) Sa

- (6) ORa

Let us call premise (5), which describes the case, "p₁". Let us call premise (1), the general norm, "p₂". Let us call the conclusion "q". We can now speak

of a transformation from p_1 and p_2 to q : $p_1, p_2 \vdash q$. Adding premises 2 and 3 makes the step from p_1 and p_2 to q deductively complete.¹¹ This deductive step is a subsumption. In order to perform this subsumption, one has, however, to creatively complete the additional premises.

Because precise interpretation performed by means of legal reasoning does not necessarily coincide with precise interpretation performed by the most natural linguistic means, it can be, from the point of view of its results, either literal, extensive, or restrictive. See the preceding section.

Concerning the Swedish Law, the following interpretation-norms are, inter alia, acceptable:

- (I1) Every concrete legal judgment must be derivable from a universal normative premise, along with further premises and inference-rules (inter alia: transformation-rules).¹²
- (I2) One must not interpret a legal norm in such a way that some parts of the norm prove to be unnecessary.¹³
- (I3) If different words or expressions are used in different parts of the same statute, one should assume that they relate to different situations, unless strong reasons for assuming the opposite exist.¹⁴
- (I4) One must not interpret similar words or expressions occurring in different parts of the same statute in different ways unless strong reasons for such an interpretation exist.¹⁵
- (I5) One must not interpret words and expressions occurring in the statute in conflict with ordinary linguistic usage unless strong reasons for such an interpretation exist.
- (I6) If, however, it has previously been established that a word or an expression has a technical meaning incompatible with everyday language, one should interpret that word or expression as having such a special meaning, without reference to everyday language.¹⁶

These norms have many functions, one of which is to ensure coherence of the interpreted law. See Chapter 4.

2.3.8. Reduction and Elimination

Assume, again, the rule "All chess players are qualified for membership in the club." Assume further that a reduction of this norm would eliminate all

but grand masters. Generally speaking, reduction eliminates, via a transformation, a part of the linguistically uncontroversial core of the application-area of the norm. It thus replaces the norm in question with another one having a smaller area of application.¹ This new norm is contentually similar to and argumentatively connected with the old one.

Elimination is a transformation resulting in a total withdrawal of the norm in question from the legal order.² One can then create of a new norm, but this new norm is neither contentually nor argumentatively connected with the old one.

In either case, this new norm might require a precise interpretation.

2.3.9. Creation of a More General New Norm

2.3.9.1. General Remarks on Creation of a More General New Norm

Assume, once again, the rule "All chess players are qualified for membership in the club", and consider the idea of extending this rule to bridge players. By this extension, one creates a new, more general, norm: "All chess players and all bridge players are qualified for membership in the club."

Again, this new norm might require precise interpretation.

I will discuss three ways to create a more general new norm: statutory analogy, argumentum a contrario, and teleological construction of statutes according to Per Olof Ekelöf.

2.3.9.2. Statutory Analogy (Gesetzesanalogie), Legal Induction, Argumentum e Contrario

By "statutory analogy" I mean that one applies a statutory rule to a case which, viewed from the ordinary linguistic angle, is included in neither the core nor the periphery of the application area of the statute in question, but resembles the cases covered by this statute in essential respects.^{1,2,3}

Statutory analogy, unlike extensive statutory construction, exceeds the linguistically acceptable periphery of the application area of the norm in question.⁴ Some writers reject this distinction.⁵ In judicial practice and in legal writing, however, one can find several examples of reasoning by analogy which is generally considered to be more radical than mere extensive

interpretation.⁶ Moreover, in penal law, for example, courts reason from analogy to a much lesser extent than by extensive interpretation. Should a court disregard the difference between them, it may unjustifiably begin to use analogy in cases where extensive interpretation is allowed.⁷

One should not confuse statutory analogy and another mode of reasoning called "law-analogy" (Rechtsanalogie), or "legal induction". (Slightly oversimplifying the matter, let us regard the two latter terms as synonymous.) Legal induction requires fulfillment of the following conditions: A case, F, is not satisfactorily regulated by statute; nor can one derive its solution through statutory analogy; one therefore adjudicates case F in accordance with a norm formulated through a generalization of several established legal norms (statutory or not).^{8,9} See below section 7.1.5.

Assume that a legal rule, N, regulates cases $F_1 - F_n$ in the way R. By virtue of weak argumentum e contrario, N is not a sufficient reason to conclude that (similar) cases $F_{n+1} - F_{n+m}$, covered by neither the core nor periphery of the linguistically acceptable application-area of this rule, should be treated in the way R. For example:

Premise N:	All chess players are qualified for membership in the club
Conclusion:	N is no sufficient reason to conclude whether or not bridge players are qualified for membership in the club.

By virtue of strong argumentum e contrario, (similar) cases $F_{n+1} - F_{n+m}$, covered by neither the core nor periphery of the linguistically acceptable application-area of the rule N, should not be treated in the way R (or: should be treated in the way non-R).¹⁰ For example:

Premise N:	All chess players are qualified for membership in the club
Conclusion:	Bridge players are not qualified for membership in the club

A justified decision not to reason by analogy constitutes a sufficient reason for recourse to weak, not strong, argumentum e contrario.¹¹ Recourse to analogy, on the other hand, excludes both forms of argumentum e contrario based on the literal interpretation of N. Analogy, however, creates a new norm N_1 , to which both forms of argumentum e contrario can apply.¹² For example:

Premise N: All chess players are qualified for membership in the club

(Conclusion by analogy to N), N_1 : Bridge players are qualified for membership in the club

Further conclusion, weak argumentum e contrario to N_1 : N_1 is no sufficient reason to conclude whether or not football players are qualified for membership in the club

Further conclusion, strong argumentum e contrario to N_1 : Football players are not qualified for membership in the club

When should one use conclusion by analogy, and when argumentum e contrario? Generally speaking, it depends on the priority order one assumes in the concrete case between justice and legal certainty¹³ or more broadly, between moral correction of the legal sources and their cognition.¹⁴

One cannot regard reasoning leading from established legal norms and established facts to this choice as deductive.¹⁵ This reasoning thus involves a transformation.

In Swedish law, analogy is the most important method to find legal solutions of cases to which neither legislation nor established precedents are applicable. Swedish lawyers often call the recourse to analogy "application of general principles of law".

The following construction-norm is acceptable in the Swedish law:

(A1) Only essential similarities between cases constitute an adequate ground for conclusion by analogy.

When evaluating how essential the similarities are, one must pay regard to a number of considerations: to the language, to other statutes, to legal certainty, to precedents and legislative preparatory materials, to traditional interpretation norms, to established evaluations, and so on.¹⁶ The following concrete illustrations are useful:

a. When, for example, the law says that "a person under eighteen years of age is a minor" this means - without the least doubt - that people older than this are of full age. In this context it is linguistically unacceptable for one to reason extensively or analogically and to draw the conclusion that some eighteen-year-old people are minors because they are essentially similar to seventeen-year-olds.¹⁷

Hence, the following construction-norm is acceptable in Swedish law:

- (A2) One should not construe provisions establishing time limits of various kinds by analogy.

One can argue similarly in the following example. Sec. 32 of the Contracts Act reads as follows: "A person who had made a declaration of will which, owing to an error in writing or some other mistake on his part, has been given another content than that intended, shall not be bound by the contents of the declaration of will where the person to whom the declaration is addressed realized or ought to have realized the mistake." One must interpret this enactment with the use of argumentum e contrario (not analogically); one should conclude that the person making the declaration of will is bound by its contents if the counterparty neither realized nor ought to have realized the mistake.¹⁸

Two acceptable construction-norms for the Swedish law:

- (A3) One should not use reasoning by analogy to eliminate statutory provisions establishing conditions under which a legal norm is applicable.¹⁹ One may, however, use it to restrict or to extend the scope of such a provision.
- (A4) One should not extend by analogy provisions constituting exceptions from more general legal rules unless strong reasons call for such an extension.²⁰

b. Another acceptable construction-norm for the Swedish law is:

- (A5) Only very strong reasons can justify a reasoning by analogy leading to the conclusion that an error exists in the text of the statute.²¹

c. Furthermore:

- (A6) One should use analogy cautiously, more cautiously than extensive construction of statutes.²²

d. Moreover:

- (A7) One should construe restrictively provisions imposing burdens or restrictions on a person, unless strong reasons require another interpretation (odia sunt restringenda). One may not in principle apply such provisions through conclusion by analogy.

The obscure meta-norm "everything which is not forbidden is permitted"²³,

expresses a similar intuition. (A slightly more precise formulation: "One should consider everything not forbidden by the established sources of the law as permitted by the interpreted valid law, unless strong reasons to the contrary exist.")

Two special cases of A7 are of the greatest importance.

da. Prima facie, conclusion by analogy has priority in private law, while argumentum e contrario has preference in penal law. In the latter, the Supreme Court exercises restraint in applying analogy.²⁴ Example: It is theft for one to come into possession of a valuable trade secret by unlawfully taking an already existing copy of a drawing. But to "come into possession of the secret by copying the drawing, on the other hand, can never be theft."²⁵ This assessment is based on a literal interpretation of BrB 8:1 which requires, for an action to be theft, that a person "take(s) what belongs to another"; "copying" is not "taking". One pays no regard to the fact that the difference between taking the existing copy, and the action of copying it, is not important from the victim's point of view.

db. In taxation law, the principle nullum tributum sine lege justifies the conclusion that one should apply analogy with restraint if it leads to increased taxation.²⁶

e. One can derive powerful argument for the use of analogy and against the use of argumentum e contrario from the fact that the discussed case (F) has in another context been legislatively evaluated as being essentially similar to the regulated cases. Hence the following construction-norm is acceptable in the Swedish law:

(A8) If an established legal norm implies that a given similarity is essential from the legal point of view, reasoning by analogy based on this similarity is justified unless strong reasons for assuming the opposite exist.²⁷

Let us add a special construction-norm concerning precedents:

(A9) One should utilize argumentum e contrario very cautiously when interpreting rules based on precedents, even more cautiously than when interpreting statutes.²⁸

In a case where statutory analogy is acceptable, i.e. where argumentum e contrario is not, one may encounter another problem, namely, the question of which analogy one should choose.²⁹ In such a situation one takes into account considerations similar to those obtaining in the choice between conclusion by analogy and conclusion e contrario.

2.3.9.3. Argumentum a fortiori

Argumentum a fortiori occurs when one reinforces a statutory analogy by an evaluation expressed in the words "in a still higher degree" or some similar term. The following construction-norm expresses this argument:

- (A10) If the statute allows one to do more, then it also permits one to do less (argumentum a maiori ad minus); if the statute forbids one to do less, then it also forbids one to do more (argumentum a minori ad maius).

Sometimes - though not often - argumentum a fortiori admits of a precise interpretation as a deductive mode of reasoning. For instance, from the premise that deaf and dumb persons may carry out a legal act before a notary public, the Polish Supreme Court drew the conclusion that a dumb (and not deaf) person was even more entitled to do so.¹

Usually, however, the inference is a (non-deductive) transformation, in most cases presupposing that something is legally or morally more (or less) than something else. Example: the Polish Supreme Court in adjudicating a certain case took as its point of departure an uncontested premise that, after a decision has come into force, a person declared incapacitated in that decision may himself - not only through a guardian - in certain circumstances apply for the decision to be revoked. From this premise the court drew the conclusion that the person declared incapacitated is even more entitled to apply for revocation before the decision has come into force.² The court based its decision on the assumption that a decision having come into force is "more" than a decision not yet have done so.

Argumentum a fortiori allows exceptions. Even though we know that to kill is more than to wound, the executioner may kill the condemned criminal but not wound him.³ Another example: One can regard the publishing of secret information as "something more" than the revealing of it to friends. But in Sweden, as a consequence of the Freedom of the Press Act, an official revealing in some circumstances secret information to his friends violates his duty to maintain secrecy; the same official, however, would not violate the law in publishing the same thing in print.⁴

What is "more" according to one person may be "less" according to another.⁵ Notwithstanding this, jurists use argumentum a fortiori in a fairly uniform way, determined to some extent by values and norms prevailing in society, and by legal ideology. Moreover, opinions about what is "more" and what "less" claim objectivity. Different persons' opinions can thus be mutually contradictory.

2.3.9.4. Teleological Construction of Statutes According to Per Olof Ekelöf

Teleological construction of a statute is its interpretation in view of its purpose.¹ On what grounds do we establish the purpose?² Many doctrines of purposive interpretation belong to the "free" legal thinking, see section 2.3.5. supra and 7.3.4. infra, and share all of its strong and weak sides.³ To judge others, for example Ekelöf's theory, is, however, more difficult. Ekelöf establishes the purpose of a statute by reference to the statute alone. A summary of his views is as follows: In ordinary or "certain" cases, jurists should apply the statute according to ordinary linguistic usage.⁴ In "uncertain" cases, courts ought not to perform linguistic analysis of the statute, nor refer to legislative preparatory materials, but consider the purpose of the enactment in question.⁵ (Ekelöf thus finds some complex interpretatory methods, and even some sources of the law,⁶ unnecessary. An exception is that he assigns a great role to precedents.)⁷ One must establish this purpose of the statute by reference to its effects (its "total result"⁸, "actual function", or "practical function"⁹) in "certain" cases.¹⁰ Ekelöf thus recommends the following chain. Statutory construction in "certain" cases takes place through linguistically natural interpretation. This statutory construction affects the outcome of "certain" cases. The outcome of these cases leads to certain effects in the community. Some of the actual effects of the application of the law in "certain" cases are considered by Ekelöf to be identical with the effects that the statute ought to have, i.e. with the purpose of the statute. The purpose of the statute, in its turn, is determinative in the construction of "uncertain" cases.^{11,12}

This method is not value-free. First of all, it is not clear how one may acquire knowledge of the effects of the application of the statute to "certain" cases. Most probably, Ekelöf sometimes establishes the actual, sociologically established effects and sometimes the hypothetical, assumed, foreseen effects.¹³ But to establish the purpose of the statute is still more difficult.¹⁴ The step from knowledge of effects (causal) to knowledge of purposes (intentional) is a transformation.¹⁵ Ekelöf considers only some of the actual effects of the application of the statute in "certain" cases to be identical with the effects that the statute ought to have, i.e. its purpose. Let us analyze an example. On Swedish roads certain speed limits are in force. What are their effects? Well, the first is that the number of traffic accidents in Sweden has diminished somewhat; another is that the number of drivers who obey traffic rules has declined even more; a third is that Swedish drivers venturing onto the German Autobahn, where no speed

limits apply, often drive badly because they are unused to fast driving. The sole purpose of speed limits, however, is clearly to reduce the number of road accidents in Sweden. It follows that the purpose of the statute includes only effects which, according to the interpreter's judgment attributed to the law-maker, are good. Ekelöf has explicitly admitted that the interpreter must rely on his own "good judgment".^{16,17}

Ekelöf's method seems to be a statutory analogy based upon relevant similarities of results;¹⁸ but he uses this method not only instead of traditional analogy but also instead of extensive interpretation. This method represents an effort to recommend consequentialist reasons (that is, one form of substantive reasons) while maintaining loyalty to the authority of statute. It may help to construct a coherent system of interpreted law, see infra section 4.1.4.2. It is, however, convincing in some cases only. Values and norms prevailing in the society to some extent regulate the justifiable application-sphere of this method but the step from knowledge of these norms and values to the conclusion that this method is to be applied in a given case is a "jump", justified only if no better coherence-creating method is available.

2.3.10. Qualification and Solution of Collisions¹

2.3.10.1. Qualification¹

As I have pointed out above, qualification is a choice of one of many possible subsumptions; one thus selects the legal norm from which - together with the appropriate additional premises - it follows deductively what kind of decision is legally possible in the case at bar.² Sometimes, the problem of qualification is trivial and thus concealed. In other situations, the problem is clearly visible and important. Let us suppose that A repeatedly hits B with malicious pleasure but at the same time intends not to inflict any bodily injury on his victim, not wanting to leave evidence of his action. Despite A's "caution", however, B sustains severe concussion. One can subsume A's action under three statutory provisions: BrB 3:5 (assault and battery); BrB 3:6 (gross assault and battery); and BrB 3:8 (the causing of bodily injury or illness). A has deliberately "caused another person pain" (cf. BrB 3:5 and 3:6) and has also "through lack of care inflicted grievous bodily harm on another person" (cf. BrB 3:8).³ The qualification of the action, however, is a more complex matter. For obviously evaluative reasons, one must undoubtedly regard A's action as gross assault and battery (BrB 3:6),

not as assault and battery simpliciter (BrB 3:5). Moreover, one must not qualify A's action as the causing of bodily injury (BrB 3:8), because "(t)he scale of penalties for gross assault and battery has such a high maximum that the penalty for assault and battery can be permitted to consume the penalty for causing bodily injury."⁴

The problem of qualification arises not only in penal law but also in all other parts of the legal system, inter alia in private international law.

The justification of this step is, as a rule, not purely deductive. In other words, it is based on at least one transformation.

2.3.10.2. General Remarks on Solution of Collisions

The problem of qualification is especially important when the competing legal norms which can be used as the starting point of subsumption collide with each other.

A non-jurist may notice that legal norms collide with each other and can criticize this fact. Judges, public officials and their assistants (lawyers), on the other hand, have as one of their main tasks that of "setting aside" collisions.¹ They have a legal duty to decide each case in accordance with the law, and can do it only if they view the law as a consistent system.^{2,3} Hence the following collision-norms are natural:

- (C1) Whenever one discovers a prima facie collision of legal norms one should set it aside, either by reinterpreting these norms, or by arranging a priority order between them.
- (C2) Whenever one reinterprets or ranks norms which are prima facie colliding with each other, one should do so in a manner which one can repeatedly use when confronted with similar collisions between other norms. One requires especially strong reasons to justify a reinterpretation or a priority order applied ad hoc, that is, only in the case under consideration.⁴

2.3.10.3. Collision of Sources and Collision of Norms

The setting aside of collisions, which one might term "legal errata",¹ consists of two steps:

- 1) The source-transformation, already discussed above,² establishes a prima facie hierarchy of the sources of the law. Two collision-norms are thus acceptable in the Swedish law.
- (C3) One should interpret different sources of the law, if possible, so that what one type of source says about a given situation is not incompatible with what another type of source says about it.³
- Interpretation of statutes, precedents, preparatory materials, etc. should thus affect each other.
- (C4) If strong reasons militate against such a reconciliation, the must-sources of the law have prima facie priority before the should-sources and these before the may-sources.⁴ If one abandons this priority in a concrete case, one should justify one's departure with strong reasons.⁵
- 2) When one cluster of thus ordered must-, should-, and may-sources leads to one norm, and another cluster to another norm, these norms can also collide with each other. The second step consists of setting aside these collisions.

2.3.10.4. Incompatibility of Rules

A further distinction exists between collision of rules and collision of principles.¹

A collision of rules occurs when the rules are logically, empirically or evaluatively incompatible. Two rules are logically incompatible if:

- a) one of them commands an action while the other forbids it (a contrary logical incompatibility); or
- b) one of them forbids an action while the other permits it (a contradictory logical incompatibility).²

A special form of logical incompatibility occurs in connection with rules of competence and qualification. Two such rules are logically incompatible if one of them states that a certain circumstance is necessary for the validity of a legal action whereas the other states that this circumstance is not necessary for the validity of the legal action. Consider the following example. JB 1:2 (now changed) demanded two witnesses for validity of a purchase of real-estate, whereas a customary-law rule stated that such a purchase

was valid even if it took place without witnesses.

If two rules are logically incompatible, one cannot apply them simultaneously.

Two rules are "empirically incompatible" if they are not logically incompatible but nevertheless one cannot simultaneously observe (or apply) them for another reason. Suppose two rules, one of which obliges A to work daily from 4 a.m. to 4 p.m., the other of which obliges him to work from 4 p.m. to 3 a.m. These two rules are "empirically incompatible"; A cannot, as a practical matter, work for 23 hours each day. (The labour law also forbids it, but it is another story.)

Two rules are "evaluatively incompatible" even if one can - logically and empirically - observe (or apply) them simultaneously, when their simultaneous observance (or application) would lead to evaluatively, for instance morally or legally, objectionable effects, whereas each norm separately does not lead to negative consequences. An example: A fisherman who had shot a seal in the sea was asked to pay both a tax under the Game Act and another tax under the Seal Fishing Act.³

2.3.10.5. General Remarks on Setting Aside Collisions of Legal Norms

One can resolve a collision of norms (rules or principles) in two alternative ways. The first one is expressed in the following collision-norm, acceptable in the Swedish law:

(C5) One should interpret different norms, if possible, in such a way that they do not prove incompatible.

If strong reasons preclude such a reconciliation, meta-norms may express priority order between the colliding norms.¹ Some meta-norms are stated in the sources of the law themselves; and some are created, modified or precisely interpreted as a result of a transformation. See infra section 3.1.1.

2.3.10.6. Short Remarks About Setting Aside Collisions of Principles¹

Concerning principles, reconciliation is very frequent, priority orders rare. One form of reconciliation occurs when the interpreter follows one of the principles only to such an extent that to follow the other is not entirely impossible. Another form occurs when one solves a collision between two

principles, p_1 and p_2 , in the following manner: in some conditions p_1 has legal precedence before p_2 , in other conditions p_2 has the precedence before p_1 .²

2.3.10.7. Some Remarks on Derogation Norms

Some meta-norms, called derogation-norms, constitute a sub-class of collision-norms that help to set aside both incompatibilities of rules and collisions of principles. The most important derogation norm is the following:

(C6) Lex superior derogat legi inferiori

When a higher norm is incompatible with a norm of a lower standing, one must apply the higher.

Consider thus the following hierarchy of Swedish laws: (a) constitution, (b) statutes, (c) norms issued by the government,¹ (d) norms issued by central administrative agencies, regional governmental authorities or local government authorities.

The meta-norm lex superior is more important than the other derogation norms, which one only applies in conflicts between norms of the same standing.

This meta-norm is a universally applicable good legal reason. A concrete legal order answers, however, such questions as: What is the precise hierarchy of legal norms?, What is the status of the lower norm which collides with a higher one? (Is it invalid or inapplicable to the concrete cases? Is it invalid or inapplicable ipso iure or only if a given procedure is followed?) What is the status of a concrete decision which follows the lower norm, not the higher one? What exceptions exist from the meta-norm, lex superior? Who has competence to decide about consequences of violation of the meta-norm lex superior? A special question concerns the courts' competence to declare that statutes incompatible with the constitution are invalid. This right to review the material constitutionality of legislation exists, for instance, in the United States² and to some extent West Germany,³ but not England or France. In the Swedish Constitution (the Instrument of Government, 1974, sec. 11:14), a new provision, in force since January 1, 1980, provides that courts may reject a statute when "obviously" incompatible with the constitution.⁴ In those areas that are not covered by the courts' right of review, the derogation norm lex superior still constitutes a valid legal argument; this norm, however, is incompatible with another one, according to which courts must respect a statute even where it conflicts

with the constitution. Elimination of this incompatibility on the meta-level requires a transformation.^{5,6}

Other known derogation norms are the following:⁷

(C7) Lex posterior derogat legi priori

Where an earlier norm is incompatible with a later one, one must apply the latter.

(C8) Lex specialis derogat legi generali.

One may apply a more general norm only in cases not covered by an incompatible less general norm.

Which norm is more general and which is less general? The statute can explicitly answer this question through the use of such words as "although", "unless", "apart from", "in accordance with what is stated below", "to a wider extent than", and similar expressions. Sometimes the answer is obvious, above all in the cases where the area of application of one statute falls entirely within that of another. But many cases are uncertain and then one must rely on a reasoning based on a transformation. An example. Assume that an employer has deducted an amount from his employees' wages in order to pay tax. Assume that the employer's bankruptcy is impending. If he pays the amount to the tax-collection authorities, he can be punished for partiality against creditors (BrB 11:4). If he does not pay, he can be punished in accordance with sec. 81 of Tax Collection Ordinance. If the Ordinance is a lex specialis in comparison with the BrB, then he should pay (cf. SvJT 1958 rf. p. 63) but there are also reasons in favor of the opposite view.⁸

(C9) Lex posterior generalis non derogat legi priori speciali.

If a later general norm is incompatible with an earlier but less general norm, one uses the earlier and less general norm.

Examples of older special norms giving way to more recent general norms do exist, but in such cases one can always point to special substantive or authority reasons; the latter may consist of valid norms of a given legal order.

The derogation norms do not solve particularly "hard" cases of incompatible legal norms. They apply only where the statute does not expressly state that they do not. Even then one can disregard them if important reasons for doing so exist. In order to gain an exact knowledge whether to apply them in a concrete case, a judge must make a creative decision, a transformation.

2.3.10.8. Some Special Collision-norms Concerning Precedents and Preparatory Materials

- (C10) If it is not possible to reconcile different precedents, one should determine which are the most important.

In so determining, the following circumstances are relevant in the Swedish law:

- (a) The decisions of the Supreme Court have greater authority than those of a court of appeal.
 - (b) Among the Supreme Court's decisions the most important are those reached in a plenary sitting. As a rule such decisions are respected on subsequent occasions even by those justices who voted against them.¹
 - (c) Old precedents which have not been confirmed by new ones have as a rule less authority than do new precedents.
 - (d) The value of a precedent is diminished if the bench was markedly divided or if the precedent has been strongly criticized.
 - (e) The authority of a precedent may, furthermore, depend on the existence of a strong need for a legal regulation in a given area.²
 - (f) Cases which are summarily reported in the NJA have less authority than have cases fully reported.³
 - (g) An established practice, based on several decisions, has great importance and is as a rule changed only as a result of amendment of the statute.⁴
- (C11) One should take into account pronouncements in the preparatory materials insofar as they (a) do not conflict with the clear statute text,⁵ and in so far as they (b) help in the interpretation of rules expressed in the statute text.^{6,7}

On the other hand, clear provisions in the preparatory materials can gain priority over the statute text, if additional strong reasons show that the preparatory materials, not the statute text, express the legislators' will.⁸ Controversial reasons are sometimes also sufficient. In NJA 1978 p. 452, the court sentenced a person for a taxation crime, on the grounds of a dubious analogy to sec. 2 par. 2 of the applicable statute; the analogy supported an application of a preparatory material contradicting the wording of the statute.⁹

- (C12) One should take into account statements in the preparatory materials which do not conflict with the statute text but which are incompatible with some general legal principle accepted in customary law only if weighty reasons for doing so exist.¹⁰
- (C13) A pronouncement in the preparatory materials which conflicts with an earlier must- or should-source (for instance, with an earlier statute or precedent) is not equal in relevance to a pronouncement which does not.¹¹

Norms setting aside collisions between different preparatory materials are neither clear nor universally acceptable. The following vague guidelines are acceptable in Swedish law:

- (C14) Whenever different parts of preparatory materials collide with each other, the following prima facie priority order should apply: a) opinions of the relevant parliamentary committees; b) pronouncements by the responsible minister; c) other materials. The legislation committee's report has a relatively great importance if two conditions are fulfilled: the Government's Bill quotes the report and the report explains obscure fragments of this Bill.¹²

2.4. THE SECOND CONCLUSION

Let us again see the simplicity behind the complexity. The discourse about the sources of the law and about their interpretation presupposes both factual and evaluative considerations. Moreover, surprisingly numerous non-deductive steps¹ are necessary for one in order to give contextually sufficient legal justification of the identification and interpretation of these sources. The non-deductive steps assure mutual adaptation of various legal sources and moral evaluations. One can say the same about the contextually sufficient legal justification of judicial decisions, and about such justification of legal reasoning in general. Some source-norms and interpretatory norms, implicitly established in legal practice, help one to perform legal reasoning. Yet they cannot entirely eliminate the non-deductive steps. One can always disregard them, if important reasons for doing so exist. No clear ordering of such reasons follows from the legal or social practice.

3. THE THEORY OF TRANSFORMATIONS AND A THEORY OF LEGAL REASONING

3.1. THE NATURE OF TRANSFORMATIONS

3.1.1. Transformations and Enthymemes

Let us now leave the contextually sufficient legal justification and pass to the problem of deep justification. Legal reasoning involves transformations, that is, non-deductive steps ("jumps") leading either to precise interpretation or to change of original premises. One must distinguish four kinds of precise interpretation or change, often affecting each other:

1) One can transform (knowledge about) a given social order into (knowledge about) valid law; this is the transformation into the law, Chapter 1.

2) One may interpret or change valid law through replacing a sentence included in a statute with another, stated more precisely, or having an entirely different meaning in the ordinary language.

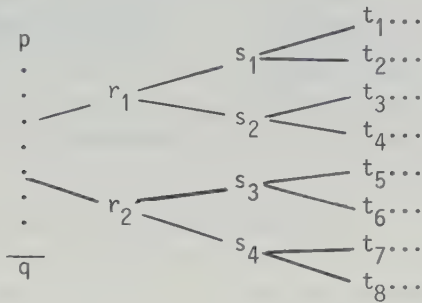
3) One may in a similar manner interpret or change a sentence included in a precedent, legislative materials, or other should- or may-sources.

4) One may in a similar manner interpret or change a source-norm or a reasoning-norm embedded in the legal practice.

Although transformations involve interpretation or change of premises, their result is often identified with the original premises, see 3.3.1. infra.

Legal reasoning, resulting in interpretation or change, involves "jumps" (see 1.1.2. supra). One converts a "jump" into a deductive reasoning in two ways: When the "jump" results in precise interpretation of the established material, one adds some new premises. When the "jump" results in a change, one adds new premises and changes some old ones. For example, the addition of some premises concerning causation in the law makes the passage from the statutory law of torts to a conclusion about liability in a concrete case a deductive subsumption, see the example in 2.3.7. supra. By definition (see section 1.1.2.), the added premises cannot be analytic (logically necessary). Neither are they trivial and commonly known (suppressed). "Jumps" are not simple enthymemes.¹ The conclusion of a "jump" is often at least as acceptable and convincing as the added or changed premises. Moreover, one has some choice between many possibilities of adding or changing premises. The conclusion of a "jump" follows from any member of a family of sets of added or changed premises. The families may be mutually incompatible. One may be unable to arrange them into a non-arbitrary priority-order², see infra section 5.2.6. For example, one can support a given construction of a statute by adding premises either about the "will of the law-giver" or about evaluation of consequences of the statute. To justify an ordering of the sets of premises

one may need another "jump", convertible to deduction by means of another family of sets of premises, and so on. In effect, one obtains a "tree" of possible premises³:



This "tree" may be theoretically infinite but in practice one must somewhere end the reasoning process, see section 5.1. infra.

3.1.2. Why so Many Transformations in the Law?

By definition, neither an addition of an analytic premise nor an addition of a trivial and commonly known premise converts a "jump" into a deductive reasoning. Some properties of the legal language and of lawyers' problem situations make transformations likely (although they are not included in the definition of a "jump"). The legal language is thus vague (fuzzy)¹ and ambiguous. It contains cluster- or family-concepts (see Chapter 5 infra), often controversial and contested. It has an "open texture"^{2,3}. The lawyers generalize the established legal sources, using legal analogy and "induction" (see supra section 2.3.9.2. and infra section 7.1.5.). Finally, the following factor is the most important cause of transformations, which would act even in the absence of other "jump"-generating circumstances. The lawyers' social role gives them a possibility to creatively adapt the law to newly generated evaluations. Consequently, one can classify justifiable inferences performed in legal thinking as follows:

1. deductive inferences;
2. ordinary transformations, occurring as a result of generalization (traditionally called "inductive" but see Chapter 7 nassim);
3. specific, "normative", transformations, resulting from mutual adaptation of descriptive and evaluative reasons (see section 3.3.1. infra).

(This classification leaves out unjustifiable inferences, e.g. mistakes.)

3.1.3. A Transformation Into a Different Category

In some (but not all) instances of transformation from p to q, p and q belong to different categories, for instance when p is a fact-descriptive statement and q is a norm-expressive statement.¹ One can construct idealized hierarchies of transformations, such as the following: perception/propositions about individual facts/theories. A special hierarchy can be constructed regarding propositions about individual facts: from propositions about "brute facts" follows a transformation to propositions about "institutional facts"². Another hierarchy is important for legal reasoning: from propositions about the facts and the moral "ought" follows a transformation to propositions about the legal "ought", see sections 1.4.7. - 1.4.10. supra. Such hierarchies can be constructed from many points of view. The above-mentioned hierarchy seems to be natural from the points of view of simplicity and epistemology.³

3.1.4. The Purpose of the Theory of Legal Transformations

The theory of transformations has an epistemological purpose. Its starting point is the empirical fact that people perform "jumps". It encourages research that might give support for the following two stronger theses.

1) Some transformations produce knowledge. Without transformations, knowledge¹ would be impossible, for instance one could not justify scientific theories. A form of "realist" criticism, accusing legal reasoning for making arbitrary and alogical "jumps"² would thus lose much ground, if one could show that the same kind of "arbitrariness" dominates all human knowledge.

2) Some transformations are justifiable, albeit one cannot tell in what a precise sense, if at all, they produce knowledge. I will argue that the specific legal transformations are justifiable in three senses:

a) They follow to some extent a set of established transformation norms; this set, taken as a whole, is in a weak sense conceptually necessary, see infra sections 3.2.1. and 3.2.2.

b) They are in a weak sense rational, see infra Chapter 4.

c) They are connected with our way of life, see Chapter 5.

The present work thus contains reasons for the thesis that legal transformations can be justified but it does not give methodological advice how to tell which transformations are justified in these three senses. Stronger theories

must give the lawyers detailed methodological recommendations but many such theories can be correct (see infra Chapters 5 and 7). The idea of transformations enriched with some philosophical points (Chapters 4-7) makes the plurality of stronger theories coherent.

3.2. TRANSFORMATION RULES

3.2.1. Types of Inference Rules

In section 1.1.3. supra, I have pointed out that there are not only regularly repeated acts of transformations but also transformation rules, that is, non-analytic inference rules. In Chapters 1 and 2 passim, I have discussed several examples of transformation rules in the law. The idea of transformation rules and inference rules in general must be discussed more carefully.

An inference rule might be of the following kinds:

I. Analytic (a formal inference rule);

II. Non-analytic (a material inference rule, a transformation rule.)

Non-analytic inference rules can be:

- (2) founded on empirical knowledge;
- (3) analytic only in some reasonable interpretations;
- (4) analytic according to some persons' opinion about the ordinary language;
- (5) stipulative;
- (6) synthetic a priori (if there are synthetic propositions a priori);
- (7) others, for instance, expressing Humean "habits", moral evaluations, etc.

See section 3.2.2. infra.

1. Analytic inference rules (expressing necessity 1)

A proposition is analytic in a language S, if one can determine its truth solely on the ground of logic and meaning postulates of S.^{1,2,3} One form of analyticity is formally logical, for instance the proposition "Fido is black or Fido is not black" is analytic in this sense: to ascertain its truth, "only the meanings of the logical particles ('is', 'or', 'not') are required; the meanings of the descriptive (i.e., nonlogical) words ('Fido', 'black') are irrelevant".⁴ Another form is exemplified by the proposition "if Jack is a bachelor, then he is not married"; in this proposition, "the meanings

of some descriptive words are involved, viz., those of 'bachelor' and 'married'." ^{5,6} The proposition "if Jack is a bachelor, then he is not married" is (or expresses, or follows from) a meaning postulate of the language S. ^{7,8,9}

2. Inference rules based on empirical knowledge will not be discussed. Let us merely give an example: if A does not answer a telephone call, he probably is not at home.

3. Inference rules analytic in some reasonable interpretations ¹⁰ (expressing necessity 2).

Consider the following situation:

- a) everybody agrees that p and q are vague or ambiguous;
and
- b) everybody agrees that there is at least one reasonable interpretation of p and q, say p^i and q^i , such that the step from p^i to q^i is analytic (and thus the implication $p^i \rightarrow q^i$ is necessary 1).

Consider, for instance, the following inference: if N is valid law then N ought to be observed. This inference is thus analytic for all reasonable interpretations of the words "valid law" but, in my opinion, only for one reasonable interpretation of the word "ought": ought = legal ought, not moral ought.

4. Inference rules (expressing necessity 3), analytic according to some persons' view about ordinary language.

Inference rules of this kind are demonstrable by logic and meaning postulates whose belonging to the ordinary language is controversial. The position of various persons with regard to them can thus be systematized according to the following alternatives:

- (aa) some positive
some neutral
- (ab) some negative
some neutral
- (b) some positive
some negative
that is:
- (ba) some accepting as necessary
some rejecting as impossible

- (bb) some accepting as contingent
some rejecting as contingent
- (bc) some accepting as necessary
some rejecting as contingent
- (bd) some accepting as contingent
some rejecting as impossible.^{11,12}

For instance, some assert and others refute the view that the inference "if N is valid law then N ought to be observed from the moral point of view" is deductive.

5. Stipulative inference rules (expressing necessity 4).

Inference rules of this kind are demonstrable by stipulative definitions, stipulative meaning postulates, and so on (together with logic). The stipulative definitions, postulates etc., one either invents for an artificial language or arbitrarily adds to the ordinary language.¹³

One could thus invent and incorporate to Petrażycki's theory of law the following inference rule: "if a norm N expresses a special kind of impulsion, connected with rights and duties, then the norm N is a legal norm."¹⁴

6. Inference rules synthetic a priori (expressing necessity 5 or 6).

Since Kant, philosophers are well accustomed to two distinctions:

- 1) analytic - synthetic, and
- 2) a priori - a posteriori.¹⁵

If a proposition is not analytic (see above) then it is synthetic. Propositions that without any doubt are synthetic, are also a posteriori, that is, empirically¹⁶ demonstrable. The opposite of a posteriori is a priori.

If¹⁷ synthetic propositions a priori exist¹⁸ they have the following properties:

- a) they claim to be necessary and universal;¹⁹
- b) their necessity is not linguistic; it is not discovered by inspection of the propositions themselves but by investigation of their "role in an organized body of experience we call knowledge".^{20,21}

Negation of a synthetic proposition a priori is not self-contradictory but false for one of the following reasons:

- c1) Nothing can correspond to this negation in the consciousness of any human being, or at least in the consciousness of a human being belonging to a given culture. Or at least:
- c2) This negation is incoherent with (inconsistent with or, contrary to expectations, unsupported by) an immense proportion of acts and beliefs of any person or at least of a person belonging to a given culture.

To deny an inference rule constitutes an anomaly. This anomaly might consist of an inconsistency (when denying necessity 1). It might, however, be weaker, when denying a transformation rule expressing necessity 2,3,4,5 or 6.

3.2.2. Transformation Norms in the Law

Most transformation norms in the law, discussed above in Chapters 1 and 2, express moral evaluations (section 3.2.1. item 7). At the same time, they jointly constitute a set that, taken as a whole, is peculiarly related to many legal concepts, including the concept of legal thinking, cf. section 3.3.1. infra. This relation is analytic in some interpretations or analytic in some persons' view about ordinary language. Although not deductive, the legal transformation norms are embedded in the language. True, none of them is as logically certain as mathematical formulas. The relation of many of them, considered alone, to legal concepts is not even analytic in some interpretations or in some persons' view. Yet one simultaneously refuting a significant part of the set of legal transformation norms and still trying to perform a legal reasoning, to use legal concepts, etc., would have to think incoherently or to change many of the legal concepts which he uses, for instance the concepts "valid law", "legal interpretation", and so on.¹

This description seems to apply to many source-, interpretation-, construction-, and collision-norms, discussed in Chapter 2. But some legal transformation norms might be more fundamental and each in itself (distributively) analytically related to legal concepts in some interpretations or in some persons' view. The Grundnorm seems to have this character, see section 1.4.7. supra.

3.3. CONTEXTUALLY SUFFICIENT LEGAL JUSTIFICATION AS A MIXTURE OF DESCRIPTIVE AND EVALUATIVE CONSIDERATIONS

3.3.1. Quasi-cognitive Character of Legal Justification in "Hard Cases"

The legal transformations are not only in a weak sense related to analyticity but also justifiable in two other manners, that is, via their relation to

rationality and to our way of life. In order to show this, we must, however, start from some reflexions on the role of evaluations in legal reasoning.

The discourse about the sources of the law and about their interpretation presupposes both factual and evaluative considerations.¹ All three stages of legal reasoning, that is, (a) the establishing of the law-character of a total norm-system, (b) the identification of the legal sources belonging to this system, and (c) the interpretation of the content of these sources², express the acceptable compromise between two ideally distinguishable components. The first is a true description of the sources of the law (and hence a true description of established evaluations). The second is a continual creation of new evaluations.

Legal reasoning contains many statements which can be interpreted as either descriptive, evaluative, or as a mixture of both. One can postulate an idealized model, nevertheless, solely for philosophical purposes, in which each statement with unclear status is replaced by a cluster of statements, some clearly descriptive, some clearly evaluative. (The cluster has a similar content to the statement it replaces but is not logically equivalent to it.) Consider, for instance, the question whether a so-called "declarative" judicial decision, stating that A is the owner of the real estate X or the like, is norm-creating or has the descriptive character.³ Legal Realists have often said that there are no "declarative" decisions, since all decisions are norm-creating. This is, however, too simple a theory. The decision is rather a sequence of many operations such as the following: establishing, cognitively, some facts and the ordinary sense of some sources of the law; evaluatively interpreting these sources, thus diminishing their vagueness and ambiguity; deciding, evaluatively, not to look for further premises of relevant legal reasoning; drawing, cognitively, logical conclusions from the accepted premises.⁴ Yet legal reasoning is supposed to justify knowledge of "the law", often (especially in clear cases) vaguely identified with knowledge of the legal sources. Courts and authorities in many countries have a legal duty to apply the law, that is to refer to the legal sources and to base their reasoning on them, even if they are obscure.⁵ The vague word "to base" indicates some justificatory support from the sources but some jurists demand much more. An extreme and naive example is the French exegetical school, according to which all legal questions can and ought to be answered by logical conclusions from the enacted law.⁶ In "hard" cases, one accepts a weaker legal support, especially when one has little opportunity to ask the norm-giving agency about the meaning of the obscure law.⁷ Most lawyers thus interpret the vague term "legal thinking" in such a way as to

imply that had courts made most judicial decisions without reference to pre-existing sources of law, then the thinking behind them would not, by definition, have been legal.⁸ See section 3.2.2. supra.

Legal reasoning is thus quasi-cognitive. One claims to base the conclusions on the sources of the law but in fact there exists the following transformation: from description of the sources one derives conclusions which do not follow deductively unless one adds additional non-analytic (material) premises, (substantive) reasons or inference rules, corresponding to the evaluative (creative) component of legal reasoning.

The quasi-cognitive character of legal reasoning promotes the rule of law. The standard German word for the rule of law is Rechtssicherheit ("legal certainty"), see also section 5.1. infra on certainty in general. I will not discuss various interpretations of this controversial expression but simply assume that the rule of law exists if legal decisions are simultaneously predictable and morally acceptable.⁹

3.3.2. The Nature of Morality

Difficulties in justifying the "mixed" and quasi-cognitive legal reasoning are still greater because the evaluative component of the mixture is itself controversial. Most legally relevant evaluations are moral but what is morality? In my opinion, moral theory must combine the following theses and solve the following problems:

- 1) Moral statements are reasons for action.
- 2) Moral statements have partly descriptive partly emotive meaning. But how are these meaning components related to each other?
- 3) Moral principles are universalizable, that is, they may not use proper names or definite descriptions, see section 4.1.3. infra. But does universalizability force one to adopt any particular moral opinion?
- 4) There is a sense in which different persons' moral opinions can be mutually contradictory. But what does the word "contradictory" mean in this context?
- 5) Good reasons may justify moral statements. But what reasons are good?
- 6) One's justified moral opinion must take into account one's intuitive evaluation of concrete cases, the principles one endorses, preferences of others, socially established principles and established inference norms. But what is the relative importance of these factors?

I share Mackie's views concerning many of these problems.¹

3.3.3. Some Remarks On Cognitivism and Non-cognitivism

I cannot discuss numerous controversies between moral intuitionists, utilitarianists, contractualists, and so on. Mention must be made, however, that a deeper source of the controversies is the problem of cognitivism.

Cognitivists would say, and non-cognitivists would deny, that norm-statements and value-statements, inter alia these included in moral "theories", have truth-values, that is, can be true or false. In this work, I need not express any unqualified commitment concerning the problem of cognitivism. Let us merely quote some (intertwined) reasons favoring a moderate form of non-cognitivism.

- 1) Nothing in the practical sphere appears as certain as some theoretical certainties. Who in the ordinary (non-metaphysical and non-metaphorical) sense denies that he is alive is less sane than a person who denies that one ought not to kill.¹ See infra Chapter 5.
- 2) The claim of objectivity presupposed by normative moral statements is less than that presupposed by descriptive theoretical statements.²
- 3) We see the "world" in which we act (including the "world" of moral values) as less predictable than the world described in theoretical propositions. In the former "world", things are capable of being otherwise than they actually are. See infra 3.3.4.
- 4) If one assumes, as some cognitivists do, that values are real properties of objects, the following puzzle occurs: one cannot perceive these value-properties via the same senses through which one perceives other properties. One cannot, for instance, see values with one's eyes; one must "see" them with a "value-sense". Consequently, the value-properties would be unique in the universe, since they would cause only one result, that is, they would cause some people to "see" values. A value-blind person, lacking the "sense of value", would never indirectly establish values the way a blind man identifies colors via a spectrograph. One might assume that no causes bring about only one result; consequently, no value-properties exist, and value-propositions are neither true nor false.³

One must, however, combine these non-cognitivist points with the weakly cognitivist view that opinions as to normative and evaluative matters are in some sense justifiable; see infra sections 4.3. and 5.1.4.

3.3.4. Reflective Equilibrium

Another problem concerns reflective equilibrium¹. From a structural point of view, a system of ethical, normative and evaluative, views is similar to a theory, see Ch. 7 infra. In any ethical "theory" one can argue in favor of general value-propositions and general norms by showing that they are supported by (coherent with) individual evaluations and individual ethical norms. On the other hand, one can argue in favor of individual evaluations and individual norms by showing that they are supported by (coherent with) the general ethical value-propositions and general ethical norms. If there is no coherence, one can try to modify each of the components. Sometimes, an individual evaluation is easier to explain away; sometimes it is easier to stick to the individual evaluation and to change the system.²

Science also mutually adapts concrete data and general theories, (see Chapter 7 infra). There is, however, a cluster of differences, empirically shown by the history of ethics. (I do not take a position as to whether one can also prove these differences analytically. Such a proof would probably require non-cognitivist assumptions.) First, whereas scientific theories and paradigms replace each other, moral "theories" and "paradigms" coexist and compete during long historical periods. For instance, a moralist of today can adopt Jesus' or Kant's moral "theory"; for one to adopt a theory of physics which was prevalent in AD 30 or AD 1790 would be ridiculous. Second, the following dilemma occurs. If a moral "theory" is expressed in precise terms, some evaluations of concrete cases may be incoherent with it (that is either inconsistent with it or not sufficiently supported by it). If one tries to avoid these counter-examples, the level of precision of the "theory" tends to be low.³ Third, it is difficult to formulate methodological rules for moral "theories". (In science, such rules tell the researcher what constitutes scientific data, what counts as a theory, what is a problem and what is a solution.⁴) Consequently, one alternatively views general value-propositions as "data" or "theories".⁵ Without the help of methodological rules, an individual cannot analyze his moral views so exactly that the analysis would tell him in advance in what conceivable circumstances he must convert from one "theory" to another. He cannot tell, inter alia, to what extent a change of his social role will affect his moral views. While a sociologist, observing this individual's behavior from the external point of view, can sometimes predict any such change, the individual, using internal perspective, cannot. Moreover, as soon as he performs his moral conversion from one "theory" to another, the new "theory", coherently adapted to his

new concrete evaluations, tends to be incoherent with some old evaluations, which he still would make, could he remember the situations in which they had originally appeared to him. A gain of coherence at one end leads to a loss at the other. Moral systems, stable in historical and external perspective, are thus unstable from the individual and internal point of view. In other words, the moral discourse is based on an irreducibly ad-hoc balance of considerations. See examples in Chapter 6 passim. Consequently, ceteris-paribus clauses are more frequent in moral "theories" than in descriptive theories. "The Aristotelian approach starts with the premises that Practical Philosophy is concerned with principles of action and that the world in which we act is a world of 'things capable of being otherwise than they are' (EN. 1140 a31 and elsewhere.) In this untidy world of the contingent and the unforeseen, universal knowledge (episteme) is not to be had, and it was Plato's greatest mistake to look for it. 'To look for demonstration in practical matters is as vulgar an error as it is to accept less than demonstrative reasoning in mathematics' (EN. 1094 b26 freely translated)."6,7

The fact that moral reasoning in our society has this property of ad-hocness justifies the conclusion that legal reasoning needs more certain, socially established, starting points. Due to its moral component, legal reasoning is also to some extent ad hoc⁸, yet is more certain than moral reasoning, see Chapters 4 and 5 infra. This fact gives the legal sources, legal reasoning-norms, and legal reasoning in general their justificatory force. (Legal reasoning is also more similar to science. Morality has no element analogous to the legal sources. We will see below, in Chapter 7, that the sources of the law can be interpreted as either analogous to scientific data or to the "hard core" of scientific theories.) From another point of view, however, discussed above, legal justification is more controversial than is the normative moral "theory": it is a mixture, of moral "theory" and descriptive theory, which one must justify.

3.3.5. Digression On Hermeneutical Circle

Regardless of the "theory circle", discussed below,¹ in many scientific disciplines one can always make the conceptual distinction between data and theory. However, as regards these humanistic theories which do not formulate laws of nature (or law-like hypotheses), one cannot say which propositions are supposed to report observational data and which are expressions of theories. Stegmüller² regards this property as an explication of herme-

neutical circle, ordinarily characterized, as follows: "the whole of a cultural product (be it literary or philosophical opus, or the entire work of a thinker or a period) can only be understood if one understands its component parts, while these parts in their turn can be understood only by understanding the whole."³ Many writers pointed out that a hermeneutical circle in this sense occurs in the legal justification;⁴ Aarnio added that methodological rules of legal reasoning are less clear than those of science⁵ and that the phenomena of hermeneutical circle, reflective equilibrium and the role of evaluations are intertwined in the legal justification.⁶

3.3.6. Digression On Unsolved Philosophical Puzzles Concerning the Legal Justification

I have presented the legal justification as a quasi-cognitive "mixture" of descriptive statements about the sources of the law and evaluative moral statements; the last ones show some peculiarities, see sections 3.3.4. and 3.3.5. supra. Is this mixture justifiable? One must choose one or more of the following ways to characterize and justify the legal reasoning:

1. Legal reasoning is unjustifiable¹, wrong, irrational, etc.
2. Legal reasoning leads to true opinion: The lawyers discover the special "expert-meaning" of the legal sources.²
3. Legal reasoning leads to true opinion: The lawyers discover the "real" valid law, not identical with the legal sources.^{3,4}
4. Legal reasoning leads to right action: When the lawyer tells us what the "valid law" is, he actually expresses his own moral opinion, telling himself or others what to do. He justifies his opinion by weighing his individual value-intuitions, general principles he endorses, and the established sources, source- and reasoning-norms, and presenting reflective equilibrium of these reasons.⁵
5. Legal reasoning leads to a change: The lawyers transform the established sources, source-norms and reasoning-norms into something else, that is, into the interpreted "valid law".

Some comments:

1. The thesis that legal reasoning is wrong is not convincing, since it refutes centuries of social practice.
2. The thesis that the lawyers discover the "expert-meaning" of the legal sources implies either that the same words and expressions have the "expert-meaning" when occurring in the law and a different meaning when occurring elsewhere, or that they have both meanings in all contexts. Such plurality of meanings is possible, albeit confusing. Yet, all evaluative

considerations, influencing legal reasoning, would then, by definition, affect the "expert-meaning" of the legal sources. The "expert-meaning" would thus have an evaluative component. The thesis that the lawyer discovers it implies a controversial epistemology, according to which one uses evaluations to discover something.

3. The thesis that the lawyers discover the "real" valid law, not identical with the legal sources, implies a controversial ontology⁶ and, again, a controversial epistemology, according to which one uses evaluations to discover the law.

4. The thesis that the lawyer develops his own moral opinion and ascribes it to the "valid law" implies that he means one thing, that is, "One ought to do X", and says another, that is, "Valid law says that one ought to do X".

5. The thesis that the lawyers transform the established law into the interpreted law contradicts the lawyers' claim to merely discover or describe the former. Moreover, how can one justify the transformation? I will discuss this question in Chapters 4-7 infra.

In my opinion, the combination of the fourth and fifth thesis is necessary to deeply justify legal reasoning. Affirming these theses, one may also adopt the second or the third opinion, if one's philosophical views permit it.

3.4. THE THIRD CONCLUSION

Back to simplicity behind complexity. The legal justification constitutes a mixture of descriptive statements about the sources of the law and normative (or evaluative) statements. The mixture expresses the rule of law (Rechtssicherheit), that is, the compromise between two components: The first is predictability; the law is more predictable than moral evaluations. The second is moral acceptability. Legal reasoning is, moreover, quasi-cognitive. One claims to base conclusions on the sources of the law but in fact one non-deductively "jumps" from these sources to the conclusions. Neither an addition of analytic premises nor an addition of a trivial and commonly known premises converts the "jumps" into a deductive reasoning. A lawyer's conclusions thus transform the legal sources into the interpreted law, partly adapted to his own moral opinion. The transformation involves two very different kinds of reasons, theoretical and practical, whose mutual adaptation requires "jumps". But this adaptation needs a deeper justification.

4. RATIONALITY OF LEGAL REASONING

4.1. RATIONALITY: SUPPORT AND GENERALITY

4.1.1. Rationality: a Necessary But Not Sufficient Condition of Justification

How can one deeply justify the "mixed", quasi-cognitive legal reasoning? One way is to point out its relation to analyticity, see supra section 3.2. One can also formulate a "Hobbesian" justification, similar to the moral justification of the "legal ought"; see supra section 1.4.10. It is morally better for a society to have a "mixed" legal reasoning than its various alternatives, such as either unrestricted moral supremacy or unrestricted supremacy of the sources of the law in the decision of legal questions. The former alternative would lead to unbridled judicial discretion, the latter to an inflexible, unchanging legal order. Such a justification would, however, require another book. Let us merely outline its two main aspects. In Chapter 4, I will show that "mixed" legal reasoning is to some extent rational, and thus superior to any irrational alternative. In Chapter 5, I will show how legal reasoning is intertwined with the totality of our way of life. The way of life gives us yardsticks, by which we can demonstrate the superiority of "mixed" legal reasoning.

4.1.2. The Idea of Rationality as a Union of Consistency, Generality and Support. Alexy's Theory of Practical Rationality

In my opinion, minimal rationality¹ is a practice fulfilling the demand of logical consistency and oriented towards the optimal combination of two regulative ideas: the idea that one should be able to express both description and evaluation generally; and the idea that both description and evaluation should be supported² by reasons. One cannot grade consistency but one can grade support and generality, and thus rationality; see, however, 4.1.3. infra.

This minimal rationality constitutes the necessary condition of rationality.³ Sufficient conditions of rationality, however, vary across different fields.⁴

Robert Alexy⁵ has elaborated a stronger theory. According to his theory, there are the following principles of practical rationality: consistency, efficiency, testability, coherence, generalisability and sincerity. In my opinion, however, support (coherence) and generality (generalisability) have

special positions. Consistency is even more fundamental; inter alia, it is a necessary, but not sufficient, condition of support. The other three principles are less fundamental: they are supported by the ideas of support, generality, or both.

Testability. The demand that a (cognitive or practical) view be testable is the same as demand that a kind of support be provided for it. The principle of testability is thus a consequence of the regulative idea of support.

Efficiency. To demand efficiency in the practical sphere comprises three requirements: effectiveness of the cluster of norms and value-propositions in question, for instance effectiveness of the law; efficiency of the discourse about these norms and value-propositions, for instance efficiency of the legal discourse; and, finally, optimal balance between the requirements of support and generality. (The two first requirements are presupposed by two specific concepts: of law and of discourse. From a legal point of view if N is the law, then people ought to observe N; hence the inefficient law which people do not observe is an anomaly. Similarly, a discourse presupposes communication between people who discuss. An inefficient discourse without communication thus constitutes an anomaly.)

Sincerity is a condition of an optimally efficient discourse and a condition of coherence between two levels: that of belief and that of speech.

Alexy has not only formulated the six principles of practical reason but also expressed a preferential relation between them, via 22 rules and six forms of argument.⁶ Let us quote the rules in an abbreviate manner, and provide them with some comments, showing their relations to generality and support.

1. Basic rules (Grundregeln)⁷, constituting the necessary conditions of any linguistic communication, in which one is concerned with truth or rightness. 1.1. No speaker might contradict himself. 1.2. Each speaker might say only what he believes. 1.3. If one uses a predicate about an object, one should use it about other objects similar in all relevant respects. 1.3'. The same applies to value- and duty-judgments (Wert- and Verpflichtungs-urteile). 1.4. Different speakers should not use the same expression in different senses.

The basic rules express the principles of consistency, sincerity and generality. For this reason, they are directly connected with the requirements of rationality in our sense. (See above.)

2. Reason-rules (Vernunftregeln)⁸. An individual who violates these rules cannot discuss in an optimal manner. 2. When asked, one must justify one's views, or justify refusal to justify them. 2.1. Anybody who can speak should

be permitted to participate in the discourse. 2.2. One may assert anything and doubt anything. 2.3. One should not use violence to prevent anybody from observing the rights expressed in 2.1. and 2.2. The reason-rules flow from the idea of support: reasoning is a better support for beliefs and value-judgments than is violence.

3. Rules of the burden of argumentation.⁹ 3.1. One who wants to treat person A differently from person B should justify it. 3.2. One who attacks a proposition or a norm that is not the topic of the discussion should give reasons for it. 3.3. One who has put forward a reason has a duty to give a further reason only if confronted with counter-arguments. 3.4. One who says something that is not a reason for anything said before, should give reasons for having said it.

Rule 3.1. expresses the principle of generality. Rules 3.2. and 3.4. are connected with the idea of support (and coherence): what one says now should either support what has been said before or justify a doubt about it. Rule 3.3. would require a complex justification in terms of support and generality.

4. The forms of argument (Argumentformen); I have no space to discuss them.

5. Justification rules (Begründungsregeln).¹⁰ 5.1.1. One must accept the consequences of a norm one accepts even if they affect one's own position. 5.1.2. The consequences of a norm satisfying a person's interests must be acceptable to everybody else. 5.1.3. Any norm must be open and possible to learn by all (allgemein lehrbar). 5.2.1. and 5.2.2. One should study the social and individual history of moral convictions in order to check whether any reasons support these convictions. 5.3. One must respect the actual limits of the possibility of fulfilling the purpose of practical discourse (Realisierbarkeit).

Rules 5.1.1. - 5.1.3. are related to generality, 5.2.1. and 5.2.2. to support. Rule 5.3. is related to practical consistency.

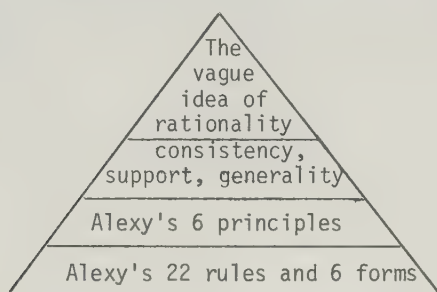
6. Transition rules (Übergangsregeln).¹¹ It should be permitted to switch to empirical (6.1.) or analytic (6.2.) discourse, or to discourse about discourse (6.3.) at any time.

These rules express the idea of support: to support practical consequences, one may use other kinds of reasons as well as practical reasons.

Alexy's rules of rational practical discourse are thus in many ways related to the demands of support and generality. On the other hand, they are unrestrictedly applicable only in an ideal situation. In concrete situations, some rules, together with the particular facts, often demand the abandonment of other rules of rationality. For instance, one may have to lie (and thereby violate rule 1.2.) in order to encourage another to obey other rules of

rational discourse. One might even justifiably resort to violence (thereby violating rule 2.3.) in order to prevent a Hitler or Pol Pot from using demagogic reasoning to create a situation in which all the rules of rational discourse would be violated. In a concrete situation, Alexy's rules thus function as if they were principles: they apply to a greater or smaller extent, depending on how they affect the applicability of other rules. There is a need for optimization: application of one rule supports a restrictive application of another. Moreover, some restrictions on rational practical discourse might promote other values such as the production of material and cultural goods.

The more precisely one states a theory of rationality, the closer will be its connection with one's own culture, and the more alien will it be for people belonging to other forms of life. Rationality seems to be a "pyramide" of more and more culture-bound ideas:



4.1.3. Generality

The regulative idea of generality manifests itself in the use of concepts and theories, and in morality.^{1,2} There are thus many specifications of the broad concept of generality. When using concepts, we put the same label on a class of things.³ Theories are often still more general than the data-propositions on which they are based. Petrażycki has pointed out that theories should be "adequate", that is, as general as possible.⁴ Rescher has developed a concept of coherence including the requirement of comprehensiveness, that is, the demand that a (coherent) theory should cover as much as possible.⁵

Morality requires universality of norms and/or evaluations. According to Kant, practical reason imposes on us the categorical imperative: "Act only according to that maxim by which you can at the same time will that it should become a universal law".⁶ (The categorical imperative is cognizable through

reason itself, non-empirically (a priori). Its only content and its only ground is thus its general "legislative form".⁷ "Man is only bound to act in accordance with his own will, which is, however, designed by nature to be a will giving universal law."⁸ A minimal content of Kant's formulation constitutes the basis of Hare's idea of universalizability and, consequently, of his system of ethics. Hare requires that ethical precepts not use proper names and definite descriptions.^{9,10} (Although one can grade generality in the broad sense, one cannot grade Hare's universalizability.) A weaker formulation, defended by Nowell-Smith and Lucas is this: We can expect a reasonable "man who differentiates in his treatment or evaluation of two cases to say, at least approximately, wherein the difference lies."¹¹ This is also one of the central ideas of justice.¹²

Generality is thus presupposed by both theoretical and practical reason. It depends on empirical circumstances, however, just how general our concepts, propositions, theories and moral judgments are to be.¹³ These empirical circumstances depend on language, the actual state of science, moral culture and so on.

4.1.4. Support and Coherence

4.1.4.1. The Concept of Support. The Relation Between Support and Generality

To say that p supports q means that p is a good reason for q. In other words, p is an answer to the question "why q?" If p supports q, then p constitutes a partial justification of q. Metaphorically speaking, good reasons support q much as one physical body supports another, for instance, preventing it from falling.¹

In the theoretical sphere, there is analogy between support in this sense and causation, since both are related to the question "why?". Asking "why?", one can thus demand a causal explanation. But one can also demand intentional explanation (that is, information about intentions "behind" a given action)², theoretical justificatory support (good reasons for the conclusion that p is true), and other information. The question "why?" is, however, good not only in the theoretical but even in the practical sphere. When asking "why?" one can, for instance, demand a moral support that is a good reason for the conclusion that p is right.

Assume that p supports q. In the simplest case of such support, a premise or an inference rule provides that if p then q (or: ... then probably q,

perhaps q, and so on - the modalities can be different).

One can express the simplest form of support, as

$$\frac{p}{K(p \rightarrow q)}$$

q

The symbol K represents the above-mentioned modalities.^{3,4}

One can also express the same relation in the terminology of inference rules: then the premise K (p → q) is dropped and replaced by an inference rule. See section 3.2. supra.

Support presupposes generality. The concept of "a reason supporting p" presupposes that reasons are to some extent general.⁵ The question "why?" presupposes an answer in a somewhat general language.

4.1.4.2. Coherence

When p supports q, one can say that p and q are coherent with each other. The concept of coherence also applies to clusters of propositions or statements (descriptive, normative, or evaluative, etc.). One can, for instance, speak about coherence between a theory and data, or between parts of a theory, or between various theories. Two clusters, T₁ and T₂, are coherent with one another if one of them supports the other; such support can be mutual. Metaphorically speaking, T₁ and T₂ are coherent if they form a tightly knit unit, a connected and unified network of elements.¹

This support-relation between clusters can be either deductive or non-deductive (based then on transformations). It can be of many kinds; one may discover more of these by generalizing the postulates formulated by various schools of methodology of science as regards the relation between data and theories.² An additional factor increasing coherence between T₁ and T₂ consists of analogy of their concepts, structures, content, etc.³

4.1.4.3. Coherence and Entailment

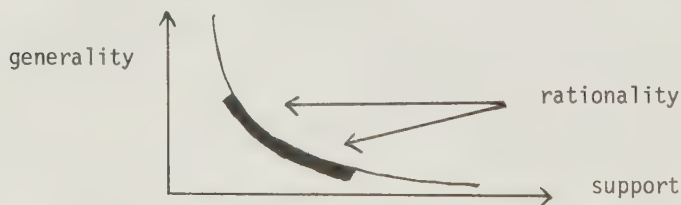
Some philosophers, for instance Rescher, have assumed that coherence is a special case of entailment¹ (and redundancy). Rescher's intuitive starting-point is the thesis that the total set of accessible data is inconsistent; a historian, for instance, receives conflicting reports from diverse sources.

Rescher determines various maximal (logically, deductively) consistent subsets inherent in the (logically inconsistent) set of data. Some of these are preferred. A proposition, p , is true, according to Rescher's coherentist criterion, if it invariably follows from all preferred maximal consistent subsets of data. Such a proposition maximally coheres with data.²

Rescher's idea easily extends to coherence between theories, as well.³ A theory and data, or two (or more) theories are, however, coherent with one another in an important sense even if such a deductive relation cannot be formulated. For instance, we need a concept enabling us to speak about coherence between precise scientific theories and vague, for instance, philosophical ones.⁴ Deep theories are often vague but they make some precise theories coherent with others.⁵

4.1.5. Optimalization of Generality and Support

Maximal generality of a cognitive theory or an evaluative (normative) system or doctrine, and maximal coherence of this doctrine or theory (that is maximal degree of support its parts give each other) cannot, for various reasons, be achieved simultaneously in all cases. Decreased generality sometimes accompanies increased mutual support, and vice versa. Rationality in such cases is optimal if the "mix" of generality and support is optimal:



There are, however, no established and universally applicable criteria of optimal rationality. What is relatively optimal, depends upon a reflective equilibrium of reasons, cf. supra section 3.3.4. Rationality is thus relatively optimal when one neither can produce an acceptable and balanced system of reasons in favor of increased generality ("paid" by decreased support) nor such a system of reasons in favor of increased support ("paid" by decreased generality). But one cannot know in concreto what is absolutely optimal. Absolute optimality, and hence absolute rationality is a mere regulative idea, of the same kind as generality, support, truth, practical rightness, etc. (see infra section 4.3.).

4.2. SUPPORT AND GENERALITY IN LEGAL JUSTIFICATION

4.2.1. General Remarks on Minimal Conditions of Deep Justification in the Law. Generality and Consistency in Legal Justification

The contextually sufficient legal justification is a quasi-cognitive mixture of descriptive and evaluative ("moral") statements. Any deep justification of this mixture requires that it at least fulfills some demands of consistency, generality, and support by both the sources of the law and morality.¹ The total practice of legal reasoning fulfills, to some extent, these demands of rationality. On the other hand, one cannot say precisely how great rationality of a given legal reasoning is. The criteria of rationality are embedded in our form of life (see Chapter 5 *infra*). An attempt to state them precisely implies "saying the unsayable". No algorithm of rational legal reasoning exists. Yet, established source- and reasoning-norms are vague yardsticks of rationality.

The contextually sufficient legal justification is undoubtedly oriented towards consistency, as all the collision norms (C1-C14, see Chapter 2 *supra*) amply show. It is, too, oriented towards generality. Mention must thus be made about the following source- and reasoning-norms: S1 - all courts and authorities must use statutes, and these are usually general; S2-S4 - all courts and authorities should apply precedents, and thus promote generality through treating similar cases similarly; I1 - legal judgments must be derivable from universal premises; I3-I6 - one should interpret similar words similarly; C2 - one should treat any collision between legal norms in a manner which one can repeatedly use in similar situations; finally, all the reasoning-norms (A1-A10) about the use of statutory analogy tell the lawyer to what extent he should treat similar cases similarly.

4.2.2. The Search for Support in Legal Justification

4.2.2.1. Support of Juristic Conclusions by the Sources of the Law

Legal reasoning requires support from the sources of the law; this is expressed in many source- and reasoning-norms. Let us mention S1-S9, demanding respect for statutes, precedents, etc.; I1-I2, demanding respect for general normative premises; A5 - one should not assume that an error exists in a statute; A8, A10 and C3 have also some significance in this context.

4.2.2.2. Support of Juristic Conclusions by Morality

Morality also supports juristic conclusions, in three different ways.

1. Some moral principles may support a cluster of legal norms, with no need of legal reasoning.¹ For instance, the principle "promises ought to be kept" supports and explains a good deal of the law of contracts. This moral support also makes the legal rules expressed in the sources of the law more coherent with each other, if the same moral principles support each cluster, or at least if the principles supporting one cluster are in a supportive relation with principles supporting another cluster.

2. Moral support of legal conclusions follows from the use of some norms of legal reasoning. Mention must be made about the following source- and reasoning-norms: S6 - new moral opinion has priority before old preparatory materials; S7 - only published preparatory materials should be applied; the use of unpublished materials would collide with the moral value of legal certainty; A7 - odia sunt restringenda and thus an individual's freedom is to be protected from judicial arbitrariness. Many norms of legal reasoning are oriented towards generality (see supra section 4.2.1.) and thus towards universalizability (section 4.1.3.) and justice (see infra section 6.2.), that is, towards important aspects of morality. Consider also the aforementioned reasons for and against the use of preparatory materials, precedents, etc., sections 2.2.4.1., 2.2.5.1., and so on. Moreover, even if prima facie moral and legal norms are mutually incompatible, legal discourse as a whole allows one to resolve the incompatibility by revising the interpretation of the legal norms, the sphere of application of the moral norms, or both.

3. Finally, even if the interpreted legal norms, produced by individual and general norm-transformation, are morally dubious, moral reasoning on a meta-level might justify this fact. See supra section 1.4.10.

4.2.3. Unusual Number of Legal Transformations is Justified as Facilitating Optimization of Generality and Two Kinds of Support in the Law

In section 3.1.2., I explained the fact that legal reasoning contains an unusual number of transformations by suggesting that it involves mutual adaptation of theoretical and practical reasons. Now, let me partly justify this fact. The transformations create innumerable opportunities for a lawyer to reason relatively rationally, that is, to balance the following aims: to set aside inconsistencies in the law, to promote generality of legal thinking, and to support legal conclusions by morality and legal sources simultaneously.

4.3. THE DEEPEST JUSTIFICATION OF SUPPORT AND GENERALITY

A rational justification of a theory of rationality would involve a logical circle. Yet, one can point out how rationality shows itself in our form of life; see also Chapter 5 infra. This is, in my opinion, the purpose of Robert Alexy's theory of "diskurstheoretischer Diskurs"¹. To deeply justify his theory of rational practical discourse, Alexy introduced four mutually combined methods of justification: technical, definitional, empirical and universally-pragmatic. In my opinion, one can try the following way to combine these methods: One starts from the definition question: what does "rational" mean? The answer is given in terms of consistency, generality and support. One then argues that logical consistency, support, that is, good reasons answering "why-questions", and generality of concepts, theories and moral precepts, are necessary conditions for knowledge, understanding and intersubjective communication (a transcendental or universally-pragmatic justification). The result, that is, the theory of rationality based on consistency, support and generality, is further checked empirically, by showing that people often act as if they had used this theory. Finally, one can point out ("technically") that by using this kind of rationality, people can survive and often achieve such goals as efficient organization, minimization of violence, some forms of justice, and so on.

Transcendental justification of the idea of support requires some comments. The faculty of asking "why?", and thus demanding causal or practical support (see supra section 4.1.4.1.) is essential for our thinking and intersubjective communication. It is perhaps not learned empirically but constitutes rather a necessary precondition of empirical knowledge and moral judgment. One wonders whether a physiological mechanism lies behind this faculty, as it seems to lie behind learning (Popper², Lorenz³), abstract thinking, culture (Lorenz)⁴, and language (Chomsky)^{5,6}.

Rational discourse, oriented towards consistency, support and generality, is directed (aimed) at truth and practical rightness. Asking "why?" means in principle that one demands a true or practically right answer. I will now make some comments about truth and practical rightness, and present some brief remarks concerning transcendental, technical and empirical justification of these ideas, independent from justification of the theory of rationality, presented above.

Truth is the regulative idea of cognitive (descriptive) discourse, inter alia of science. It is controversial whether, and in what sense, scientific theories succeed in their pursuit of the truth. Do theories formulate correct

models or interpretations of reality? Are theories irreplaceable: must replacing them by observational propositions lead to loss of true knowledge?⁷ Epistemological realism answers these questions in the affirmative, instrumentalism in the negative.⁸ It is unclear who is right, since each answer presupposes a particular view on such philosophical topics as truth, models, interpretation, reality, objective knowledge, real existence etc. Neither the controversies between epistemological realism and instrumentalism, nor controversies between various schools of philosophy of science (see infra Chapter 7) should, however, obscure the central point⁹, namely that the idea of truth gives purpose to cognitive, inter alia scientific, activity, and thus constitutes the regulative idea of science and cognition.^{10,11} Let us add a few words about what this idea means: "To say that something is true is to say that there is a correspondence between it and a fact."¹² It follows that "in making any kind of truth-claim or knowledge-claim, we are committed to holding that certain objects, which the assertion is ultimately about, exist."^{13,14}

I will now argue that one cannot think and discuss about moral or legal matters without some understanding of the idea of "practical right"¹⁵, just as one cannot think and discuss about theoretical matters without the idea of truth. Let us restrict our discussion to three versions of practical right. The first is the complex idea of moral rightness, see sections 3.3.2.-3.3.4. supra. Moral judgments are impossible without some understanding of the idea of "morally right". The second is practical rightness from the legal point of view, see section 1.4.10. supra. One cannot coherently speak about valid law without some idea of "legally right", see section 1.4. passim. The third version of practical rightness is praxeological, related to action. Whoever acts, presupposes that the action is in some sense (moral, legal, hedonic, utilitarian, etc.) better than its absence, that is in some sense right. One cannot act unless one feels the difference between right and wrong action.

Let us now leave transcendental justification and make some technical and empirical points. To achieve their goals, people must assume some versions of the regulative idea of practical rightness. For example, efficient social cooperation requires some idea of moral rightness, efficient legal research requires some conception of legal rightness, etc. To this technical justification corresponds an empirical one: When acting, we all do assume praxeological rightness, and we often do assume moral and legal rightness.

Finally, some points about the relation between practical rightness and truth: The cognitivists would say, and the non-cognitivists would deny, that the idea of practical rightness is a special case of the idea of truth. One can distinguish three concepts of truth, the logical, the epistemological

and the ontological. One sense of the logical is formal: "true" is what has the positive value within a formal semantic calculus, see section 1.2.5. supra, note 6. The epistemological is a regulative idea, giving purpose to cognitive activity. The ontological assumes that there "outside" exists something real to which a true proposition corresponds. In my opinion, norms are "true" or "false" in the formally-logical sense and have values of "right" and "wrong" in the epistemological sense¹⁶, but are neither true nor false in the - most natural - ontological sense of "true". See section 3.3.3. supra.

4.4. THE FOURTH CONCLUSION

Back to simplicity behind complexity. Legal reasoning fulfills the demands of rationality understood as a union of logical consistency and two ideas, the idea that one should seek argumentative support, and hence coherence, and the idea that one should seek generality of concepts, theories and moral precepts. The contextually sufficient legal justification is oriented towards generality and consistency. It receives support from the legal sources. Moral reasons also support juristic conclusions. Summa summarum: Mixed and quasi-cognitive legal reasoning may be rational. This is its minimal deep justification. One can formulate this justification without recourse to the ontological concept of truth.

4.5. DIGRESSION: A KANTIAN REFLEXION

According to Kant, one cannot empirically demonstrate that space and time exist, because such an empirical demonstration already presupposes space and time.¹ Although mathematical and physical theories change², all of them must assume that objects of experience are located in some kind of time and space³. Our intellect, then, uses categories to actively organize spatially and temporally ordered sensations and enables us to experience objects.⁴ Kant has formulated a list of categories (logical forms or types of judgment)⁵ including, inter alia, unity, substance and causality. According to Kant's principle of causality all alterations thus take place in accordance with the law of cause and effect.⁶ Advanced physics, advanced philosophy, etc., might modify the common-sense category of causality, but the resultant concept must be useful for making distinctions similar to those made by the

concept of causality in the ordinary sense.

Practical reason, on the other hand, makes us conscious of freedom and - at the same time - that there are objectively grounded moral laws. According to Kant, a human being cannot think without a category. In the practical sphere, instead of using the category of causality in the natural sense, he uses the idea of moral law.⁷

We can use these thoughts in a weakened form: affirming that the idea of practical rightness and moral laws is necessary for practical rationality, practical thinking and practical discourse, but observing neutrality as regards the relation between practical rightness and truth in the epistemological sense, and refuting the relation between practical rightness and truth in the ontological sense.

5. FOUNDATIONS OF KNOWLEDGE. LEGAL IDEOLOGY¹

5.1. ON FOUNDATIONS OF KNOWLEDGE

5.1.1. Limits of Justification via Rationality

"Mixed" legal reasoning may be rational. This is its minimal deep justification. Note, however, two important problems. First, the deep justification of legal reasoning requires reference not only to rationality¹ but to a richer cluster of convictions and commitments that our culture takes for granted as certain.

Second, rationality presupposes giving reasons but can one give reasons ad infinitum? One can discuss the problem whether p supports q here and now independently from the problem whether p itself is supported or not.² Philosophers, however, often persist in asking for reasons when ordinary people would refuse to give them. In this way, they invoke the concept of ultimate foundations of knowledge.

5.1.2. General Remarks on Foundationalism and Coherentism

Foundationalists¹ believe that an ultimate and certain ground for knowledge exists. Some truths are evident, others merely reasonable or acceptable.²

The key criticism of foundationalism is, however, "that the basic beliefs required by foundationalism turn out to be no more privileged and have no better justification than many other beliefs."³ Coherentists thus conclude that no beliefs are certain and that knowledge thus constitutes a totality whose fragments support each other.⁴

To that, one objects "that... false beliefs may also cohere. The coherentist has no rational way of choosing between equally coherent systems".⁵

5.1.3. Wittgenstein on Certainty¹

5.1.3.1. The Limits of Doubt

A synthesis of foundationalism and coherentism has been suggested by Wittgenstein: One cannot doubt everything^{1,2} because doubt needs undoubted grounds.³ "If you are not certain of any fact, you cannot be certain of the meaning of

your words, either."^{4,5} Consequently: "The game of doubting itself presupposes certainty".⁶ In the system of our knowledge, "some things stand unshakeably fast and some are more or less liable to shift."⁷ These "fast" things are more certain than any grounds which one can give in favour of them⁸ and one can accept nothing as evidence against them.⁹ We can ask whether it can make sense to doubt them.¹⁰ On the other hand, Wittgenstein has pointed out that our "knowledge forms an enormous system. And only within this system has a particular bit the value we give it."¹¹ "It is not single axioms that strike me as obvious, it is a system in which consequences and premises give one another mutual support."¹² One cannot simultaneously doubt all the "fast" things, but one could every single one separately.^{13,14} One could thus doubt p_1 when assuming p_2 and p_3 , and doubt p_3 when assuming p_1 and p_2 . In a standard symbolism: $\forall pM(p \text{ is doubted})$, but not $M\forall p(p \text{ is doubted})$.

5.1.3.2. Certainty, Form of Life and Language-games

Moreover, an involved relationship exists between certainty, knowledge, language and action. Wittgenstein wrote: "Giving grounds ... comes to an end; but the end is not certain propositions' striking us immediately as true...; it is our acting, which lies at the bottom of the language-game."^{1,2} And "I shall also call the whole, consisting of language and the actions into which it is woven, the 'language-game'."³ Moreover: "the speaking of language is part of an activity, or of a form of life."⁴ Finally: "Our talk gets its meaning from the rest of our proceedings".⁵

Since language is thus related to action, and since cognition and language are intertwined,⁶ cognition (including certainty) is also related to action. The conclusion is that "at the beginning was the deed".⁷ The deed is at the bottom of all cognition, including its most certain points and including the picture of the world - the Weltanschauung.⁸ This Weltanschauung is like the bank of the river of our fluid (changing) experiences. "And the bank of that river consists partly of hard rock, subject to no alteration or only to an imperceptible one, partly of sand, which now in one place now in another gets washed away, or deposited."⁹ The Weltanschauung, however, manifests itself in action,¹⁰ and is then the same thing as the "form of life." Wittgenstein's references to the form of life suggest something important but unclear, "the presence of things partly hidden and not yet fully disclosed."¹¹ In my opinion, the form of life is a reification of the unknown end-points of justification. (Analogously, the state in Kelsen's sense is a personification of the legal order.¹²)

The idea that action has priority before beliefs admits many interpretations. In my opinion, the following asymmetry is perhaps essential: Beliefs can be provisional ("I think so but I might be wrong"), whereas action is definitive and irrevocable.

Language is Wittgenstein's starting point but when discussing the forms of life, he transcends the language.¹³ But one must go further and agree with Castañeda that there is "the need to critique ordinary language".¹⁴

5.1.4. Strong and Weak Certainty

Let us now leave Wittgenstein and formulate some general conclusions.

Every individual has a system, to some extent coherent, of actions, beliefs, concepts, evaluations, norms, etc. Let us call it "A's system".¹

A's system of propositional beliefs, constituting a part of his total system, is relatively well justified, if and only if the following conditions are simultaneously fulfilled:

- 1) This system is to a high degree coherent; many parts of it support and are supported by many other parts.
- 2) It is to a high degree coherent with an immensely large cluster of A's action, covering A's life as a whole.
- 3) It is to a high degree coherent with the "certain points" sensu stricto (about which there is strong certainty), and with relatively "certain points" sensu largo (about which there is weak certainty.)

The "certain points" sensu stricto comprise action necessary for survival (e.g. eating) and beliefs or conditions of beliefs no human being can dismiss without replacement by counterparts having partly the same meaning-components. Here belong such ideas as time, space, truth, practical rightness, causation, generality, support (answering the question "why?"), quantification, substance, etc. On the other hand, we regard the "certain points" sensu largo as certain because their negation would be coherent with the negation of unusually many normative and evaluative propositions actually governing our action, and with negation of unusually many firmly accepted beliefs. In this sense, their negation would commit A to actions he could not perform and perhaps to silence and passivity.

The degree of justificatory support, and hence the relatively optimal rationality of a theory or doctrine (section 4.1.5.) must be judged in view of A's system, ultimately based on "certain points".

5.1.5. The Spiral of Experience

A's experience constitutes a system of mutually supportive beliefs, norms, values, actions and concepts. The components are in the causal feed-back relation and in the justificatory spiral-relation.¹ This does not mean, however, that knowledge is based on a vicious circle. First, there is no circle but a spiral.² People do not literally justify p by q and q by p, at the same time, but rather as follows: at first, p justifies q; later, q constitutes a reason justifying a modified version of p, say p'; still later, p' constitutes a reason justifying a modified version of q, say q'. Moreover, when p justifies q and q justifies p, it is always a partial, never a total, justification; p is not a necessary condition for q and q for p; p is merely one of many reasons jointly justifying q, and q is one of many reasons jointly justifying p'. Finally, the step from p to q is often not deductive but accomplished via transformation.

As a special case of this spiral of cognition, mention must be made of the so-called "theory-spiral": data supports a theory; this theory supports new data; it supports a new theory, and so on;³ a changing methodology, rooted in language, philosophy (including ontology), action, etc., decides what is a satisfactory support of a theory by data and vice versa.^{4,5}

As another special case, let us discuss Rescher's methodological pragmatism. Rescher justifies cognitive methods in terms of their producing applicatively successful theses.⁶ But the following dilemma presents itself: does success assure the truth of these theses? To answer this question, Rescher has expressed the metaphysical idea "that while action on false beliefs... can on occasion succeed... it cannot do so systematically, the ways of the world being as they are".⁷ Primacy of practice justifies knowledge, and metaphysics justifies the primacy of practice. But the metaphysics itself is justified by knowledge.⁸

5.1.6. Isolated Fragments of the Spiral of Experience

From the profound philosophical point of view, experience is thus holistic. But, on the other hand, a scientist cannot avoid isolating a mere part of the whole in question. For instance, he abstracts from many factors, restricts his interest to isolated systems, and takes for granted some methodological rules (see section 7.1.6. infra) etc., without a thought about their being questionable. One thus divides the spiral of experience into

paradigms, see infra section 7.3.

A contextually sufficient justification stays thus within the paradigm. A "superparadigm" makes it possible to go deeper and to discuss concepts and theses taken for granted within the paradigm. One can imagine a whole hierarchy, or many hierarchies, of "superparadigms". But how deep can the deep justification reach? The ultimate point is determined by our form of life. This end-point is not logical in the traditional sense but factual. In other words, from a logical point of view one can always ask whether p, which supports q, is itself supported. But in fact, this question is sometimes regarded as good, sometimes as strange, that is, expressing doubt as regards the "certain points" embedded in the form of life, see supra sections 5.1.3. and 5.1.4.

Moreover, these "certain points" constitute one's framework in the following sense: as soon as one is confronted with an argument against the framework, one finds stronger arguments for the framework. Popper has written: "(I)f we try, we can break out of our framework at any time." But he has admitted that then "we shall find ourselves again in a framework, ... a better and a roomier one".¹ The form of life symbolizes the ultimate framework from which one cannot break out.

5.1.7. Social Dimensions of Knowledge. Form of Life

Let us now add the social dimension. A's system is causally affected by other people's systems. He learns language¹ from others and has confidence in what they say; his life and his estimation of right and wrong are adapted to the lives of others. We regard the same things as "certain".^{2,3}

An important question follows: does justification of knowledge depend on consensus?⁴ The answer to this question must employ a more sophisticated notion of consensus than an electoral theory of knowledge holding that the majority opinion is always right.⁵ According to Tranøy and Aarnio, epistemologically relevant consensus about p exists among the relevant persons (i.e. audience⁶, colleagues, peers) when they either accept p or agree that p is acceptable;⁷ p is acceptable to two people A and B if, and only if, A finds it legitimate (or permitted) for B to accept and assert p even if A himself prefers not to accept and not to assert p, and vice versa.⁸ One thus judges acceptability in view of norms of inquiry, and it is these which A and B actually accept^{9,10}. On the other hand, A can always ask himself why he should follow the accepted norms of inquiry, why he should follow the socially

accepted sense of the word "knowledge". The norms of inquiry can be acceptable in view of themselves (circularly) or in view of an infinite chain (of the norms of inquiry of the norms of inquiry of the norms of inquiry ad infinitum). A can thus always put them in question until all the propositions relevant to this justification procedure are coherent with each other and with very many "certain" points of A's system. Only A's total system (of beliefs, etc.), and nothing else, ultimately determines what are the yardsticks of acceptability with which A is satisfied. A cannot "jump out" of his system.¹¹

A's system determines what is justified from A's point of view; B's system, from B's point of view. These systems often stand in the relation of causal interdependence and relevant similarity as regards concepts, accessible empirical data and endorsed values.¹² When this requirement is not fulfilled, "then each man declares the other a fool and heretic."¹³ There can thus be some topics about which a maximal discussion in A's system will lead to the conclusion p while in B's system it would lead to the conclusion non-p. This rules out rational discussion and rational consensus between A and B. On the other hand, however, A can sometimes irrationally persuade B.¹⁴ Assume, for instance, that A and B can rationally discuss about something else, x. A can convince B to change his views about x; this change will cause a change in B's framework: now B may gather rational arguments which in his new system will be sufficient to prove p.¹⁵

A and B belong to the same form of life if their systems are in such a relation of causal interdependence and relevant similarity that they can rationally discuss about most of the relevant topics of their respective lives. (Perhaps one should add that they can persuade each other about nearly all relevant topics of their lives). When A and B can rationally discuss about x (for instance, physics) but not about y (for instance, justice), they belong to the same aspect¹⁶ of the form of life as regards x, and to two different aspects as regards y.

All people, however, regardless to what form of life they belong, have many things in common, including a minimum level of rationality (e.g. the capability of asking "why?"), and thinking in general terms.

5.1.8. A Possible Knowledge Is Weaker Than The Concept of Knowledge Claims. Limits of Coherence. Pluralism of Knowledge

This general discussion about knowledge illustrates the following inconsistency: (1) A conceptual analysis shows, first, that knowledge cannot be more

strongly justified than within the spiral of experience; and, second, that the ultimate criterion of justification is nothing more than mutual support (coherence) among components of this spiral. Moreover, we know that we might always be wrong. Even better reasons for scepticism apply to the realm of evaluations, see supra section 3.3.3. (2) On the other hand, we believe that some beliefs are true. The concept of knowledge presupposes a stronger claim than a mere coherence. A system of beliefs can thus be coherent and yet false. Thinking about evaluative matters presupposes some understanding of the concept of "practical right", just as thinking about theoretical matters presupposes some understanding of the concept of "truth"; see supra 4.3.

Under some natural interpretations of the word "knowledge", our knowledge-claims are thus inconsistent. Inconsistency and more often incoherence occurs not only on the meta-level. No sphere of our beliefs and evaluations is entirely coherent. When incoherence reveals itself, one might decide to eliminate something from the totality of one's views and thereby make the resulting narrower sub-system entirely coherent. But the choice between what to eliminate and what to keep is to some extent free. This explains why "there may be many different... but... equally valid descriptions of one's reality."¹

5.2. CERTAINTY AND PLURALISM OF LEGAL KNOWLEDGE. LEGAL IDEOLOGY

5.2.1. Some Solved Puzzles About Legal Reasoning

This general discussion about knowledge is useful to solve some puzzles about legal reasoning.

1. Legal reasoning uses non-deductive inferences¹ (transformations) to synthesize normative moral opinions and description of the sources of the law into one totality.² Its problem is to eliminate inconsistencies and to create coherence (mutual support).³ This it tries to do, never entirely succeeding. Now, this is like cognition in general: aiming at coherence, using non-deductive inferences, and never succeeding entirely.⁴

2. Legal reasoning is pluralistic: there is the controversy between Natural Law, Legal Positivism and Legal Realism;⁵ there are many controversies regarding "hard cases".⁶ This is like pluralism of knowledge in general.⁷

3. Legal reasoning relies upon some socially established reasoning norms. This is, again, like reasoning in general, but demands some comments.

5.2.2. Legal Ideology, Its Content and Nature

Metaphorically speaking, a good lawyer is not only an egoist, following his own preferences, but also both a moral person whose conscience creatively decides how to pay attention to needs of others, and a social person who follows the established opinions, expressed, inter alia, in the enacted law.

The socially established "certain points" in the law constitute a legal ideology that provides transformation-norms backing the "jumps" in the law.¹ It includes many components. We have thus discussed must-sources, should-sources and may-sources of the law, and the source-norms that specify what belongs to these categories of sources.² Furthermore, we have discussed established criteria of valid law and the Grundnorm 2^J, telling us under what conditions a constitution ought to be observed from the legal point of view.³ We have discussed, as well, substantive and authority reasons⁴ and three kinds of legal reasoning norms, that is, interpretation-norms, construction-norms and collision-norms.⁵

The great role of legal ideology in legal reasoning is coherent with the view that all knowledge needs socially established starting points, see section 5.1.6. supra and 7.3. infra on paradigms. But one can also find an additional reason for the fact that legal reasoning relies upon socially established sources and reasoning-norms. Moral reasoning is less certain than, for example, science, see section 3.3.4. supra, and thus needs amplification by social consensus. This amplification is provided by the law.

The doctrine of the sources of the law is a component of legal ideology. This doctrine says, inter alia, what material one must, should, or may use in that part of justification of judicial decisions that devotes itself to legal questions. The doctrine of the sources of the law comprises, inter alia, the norms of recognition of the law. The norms of recognition are transformation-norms for the criteria-transformation (not for the category-transformation). They are linguistic⁶ (terminological, conceptual), and they decide what should be called the legal order of a given society. Hart's famous rule of recognition, see supra section 1.4.3., comprises the part of linguistic norms of recognition explicitly repeated in or implicitly derivable from the constitutional practice, which thus circularly confirms the same norms of recognition that decide about its character of constitutional practice.

The doctrine of the sources of the law comprises, too, some transformation-norms for category-transformation;⁷ these are partly backed by moral reasons,⁸ and thus this part of the doctrine is not merely linguistic.

Legal ideology gives each lawyer prima facie yardsticks of acceptability⁹

for legal reasoning. He can combine them with the requirement of rationality, and review them in order to achieve coherence among his own views. The result will be, for him, the maximum of rational acceptability.¹⁰

Legal ideology is a specialized part of our form of life and cultural tradition (see section 5.1.7. supra¹¹). It is related to action; an "ideology" expressed merely in words, not applied in action, is a bluff.

5.2.3. What Does "Established Legal Ideology" Mean?

Legal ideology is a theoretical construction that aims at making a coherent totality of fragmentary practices and norms performed and internalized by courts, authorities, lawyers and some laymen. These people act and speak as if they were accepting legal ideology. Legal ideology is, inter alia, established in four following ways. (1) One part of it is explicitly formulated in the statutes or other legal sources; however, these sources must be construed, sometimes contra legem.¹ (2) Another part is acceptable² for all courts, authorities and lawyers. It is implicit, derivable from their practice. It consists of grundnorms, source-norms and reasoning-norms which they would accept in the optimal conditions of rational discourse. (3) The third part contains grundnorms, source-norms and reasoning-norms which some courts, authorities or lawyers would accept in such optimal conditions. (4) The fourth part consists of grundnorms, source- or reasoning-norms that one expects to be accepted by some courts, authorities or lawyers in some imperfect conditions of discourse; this expectation may be based on sociological theories etc.

5.2.4. The Spiral of Legal Experience

Legal reasoning thus consists of mutual adaptation of legal sources and evaluations. Established grundnorms, source- and reasoning-norms help one to achieve this adaptation but they, too, must be continually adapted to newly generated evaluations. Legal sources, established norms of legal reasoning and "new" evaluations change and enforce each other in a spiral, until one reaches reflective equilibrium. Among other things, the prima facie criteria of law (see section 1.3.5. supra) make the legal discourse possible, and the legal discourse may lead to the evaluative revision of the criteria of law, and hence to the revision of the legal discourse.¹ Transformation inside the law presupposes, is affected by, and affects transformation into the law.

5.2.5. Versions of Legal Ideology. An Example Concerning Doctrines of Statutory Construction

There are many versions of legal ideology, depending on differences between legal professions (judges' ideology, attorneys' ideology, etc.), various national characteristics, religious and political beliefs, moral theories, changing characteristics of the society, and even fashion and chance. Moreover, there are many ways to arrange interpretatory and meta-interpretatory norms, as well as source-norms and reasoning-norms, in bigger units, that is, in normative doctrines such as doctrines of statutory construction.

A subjective constructional doctrine teaches that the main purpose¹ of construction lies in establishing the will of the legislator. A more cautious version of this doctrine holds that interpretation influenced by the legislative preparatory materials of the statute is the most important method of construction. An actualized subjective doctrine of construction considers that the main purpose of construction lies in adaptation to the will of the present holders of power. A more restrained version of this doctrine teaches that the most important method in interpretation of old statutes is adaptation to the legislative preparatory materials of new statutes. An objective constructional doctrine holds that "the statute is wiser than the legislator". According to the most radical version of the objective constructional doctrine, the main purpose of statutory construction, is to establish the objective, linguistic meaning of the statute. A teleological doctrine of construction states that the main purpose of construction is to apply the statute in accordance with its purpose. A community-oriented doctrine of construction is based on the thesis that the statute should be adapted to the accepted social evaluations.²

Wróblewski has divided all constructional doctrines into two groups according to the assumed main function of statutory interpretation.³ Static constructional doctrines teach that the main function of statutory construction is to promote legal certainty. Dynamic constructional doctrines consider that the main function of statutory interpretation is to adapt the statute text to "the requirements of life". One can also distinguish between free, and bound style (or ideology) of legal interpretation, the first emphasizing substantive reasons, the second authority reasons.⁴ One can associate the first with the socially-oriented "paradigm" of legal research,⁵ the second with the "formalistic paradigm".⁶ One can even have an intermediate category⁷, such as Wróblewski's "ideology of legality."⁸

The legal interpretation which is in practice carried out does not systematically give priority to any single method, norm or metanorm but mixes all

of them together, and in this way one reaches a "correct" solution of interpretatory problems. Legal ideology is thus not one consistent and coherent system of cognitive and normative convictions (and propositions) but rather an ever-changing cluster of convictions (propositions), which one can partly (never totally) arrange in many internally coherent but mutually incoherent systems.

5.2.6. No One Right Answer

Yet, Ronald Dworkin thinks that there is almost always a single right answer to a legal question. One can describe the background of this thesis, as follows.

1. Dworkin has pointed out that, apart from legal rules, there are legal principles¹, binding judges but not enacted in any sources of the law. "The origin of these as legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time."² A principle "is to be observed... because it is a requirement of justice or fairness or some other dimension of morality."³ At the same time, Dworkin has pointed out that "a good fit" with "institutional history" is required for legal principles.⁴ No "principle can count as a justification of institutional history unless it provides a certain threshold adequacy of fit, though amongst those principles that fit this test of adequacy the morally soundest must be preferred."⁵ The moral appropriateness is one necessary, although not sufficient, condition of legal validity of principles, the institutional support is another one.

2. Dworkin has ascribed to Legal Positivism the following thesis: "To say that someone has 'a legal obligation' is to say that his case falls under a valid legal rule that requires him to do or to forbear from doing something".⁶ It follows that when the judge decides a case that does not fall under a valid legal rule, he is exercising his discretion.⁷ Dworkin has refuted this positivistic thesis and, instead, formulated the "rights thesis, that judicial decisions enforce existing political rights".^{8,9} generated and "described"¹⁰ by (moral) principles, not policies.¹¹ (No matter what argument the judges present, their reasoning "is intended to answer the question whether or not some party has a right".¹²)

In this context, Dworkin has argued that the question, What is the law on this issue? has almost always only one right answer.¹³ A perfect judge (Mr. Hercules Judge) would find it when applying the "constructive model",

that is, he would regard precedents "as specifications for a principle that he must construct, out of a sense of responsibility for consistency with what has gone before."^{14,15} Every judge "should try to get as close to Herculean competence as he can."^{16,17} (The probability "of such a balance of reasons that the best answer would not even in theory be possible" is low.¹⁸) But this doctrine is objectionable:

(1) Let us agree that the use of such concepts as "dispute", "reasons", "justification" etc. presupposes that one can discuss legal questions. Let us agree, as well, that the concept of discussion presupposes that (legal) opinions can be right or wrong. This assumption - necessary for a meaningful legal discussion - is, however, weaker than Dworkin's right-answer thesis. All we need is the possibility of asking the question in each legal case, what solution is right if any. The answer may be strong ("the solution x is right"); weak ("one of the solutions x_1-x_n is right but one cannot tell which one"); relative ("the solution x is right from the point of view of a given group of people, or in view of some reasoning norms", etc.); both weak and relative; or negative ("no solution is right"). All people possess the regulative idea demanding that one shall search for the right answer¹⁹, but one need not assume that the unique and absolutely right answer "exists".

(2) On the other hand, the procedure of legal discourse shows that there are no effective criteria for finding the right answer to all "hard" legal questions. An individual often arrives at the best answer given his world picture at the time in question; he also claims that the answer is "inter-subjectively" right; but the validity of this claim depends on whether there are sufficient criteria of acceptability for such an answer or not. The combination of the sources of the law and the traditional source norms and reasoning norms provides some criteria, but these are not perfect. I thus see no conclusive reason to say that, in the community of Herculesees, one Hercules would reach the same right answer as another Hercules. In particular, one must consider, what follows.

a) Should the Herculesees talk ordinary language, not merely formal logic, their language is vague, ambiguous and evaluatively open. The concepts used by Hercules No.1 might differ from the concepts used by Hercules No.2; thus would their views diverge.

b) Legal justification presupposes non-deductive justificatory steps (the "jumps", the transformations). A hypothesis seems to be reasonable (although difficult to verify) that the greater is the share of non-deductive "jumps" in an inference process, the lesser is the certainty of its conclusions.

c) I do not believe that the only one right political ideology exists.

Since legal and political matters are intertwined in some "hard" cases, a Liberal Hercules might find one right answer, a Conservative Hercules another.²⁰

d) The moral discourse is based on balancing of considerations ("reflective equilibrium") but it is difficult for one to convincingly express the balance as a precise priority order, valid for all possible situations. See sec. 3.3.4. supra and Chapter 6 infra. Consequently, the legal justification, intertwined with the moral one, is not expected to be as certain as, e.g., natural science.

e) The class of factors relevant to the determination of the right answer to moral and legal questions is indefinable; for example, neither the class of relevant moral reasons or the class of the sources of the law which may be used in the legal justification is precisely defined.

f) The reason telling for and against a given answer might be incommensurable. Not even within a given ideology, one can "use a single scale of measurable values". In fact, one uses "evaluation" which "involves multiple criteria, which must include at least 'justice', 'common sense', 'public policy' and 'legal expediency'".²¹ "Dworkin's argument assumes too simple a metric for the strength of considerations, that such strengths are always commensurable on a linear scale, so that the strength of the case for one side must be either greater than that of the case for the other side, or less, or else they must be equal in the sense of being so finely balanced that even the slightest additional force on either side would make it the stronger. But in fact considerations may be imperfectly commensurable, so that neither of the opposing cases is stronger than the other, and yet they are not finely balanced."²² One must weigh the relevant factors against each other. The result of weighing of any pair of factors depends on an ever-changing influence of an indefinite number of other factors. For example, the weighing of the plaintiff's and the defendant's rights in torts might depend on various economic and social considerations. The result might also depend on the order in which the reasons are presented. It might, finally, depend on consequentialistic considerations regarding the future effects of the decision; in such a case, uncertainty of future creates indeterminacy of weighing of morally and legally relevant factors.²³ The Herculeses can sometimes agree what factors are relevant to the determination of the right answer, yet Hercules No.1 would have his reflective equilibrium of relevant reasons, Hercules No.2 his.

g) Legal history shows that the best answers, and indeed the best interpretatory methods etc., change with time. This makes uncertain whether the

right answer given by Hercules on Friday is still right the following Monday.

(3) Finally, philosophical analysis of the expression "the right answer to moral (or legal) questions" shows that the right answer is the acceptable answer. (We cannot imagine what else the right answer could be.) But the notion of acceptability is person-related: acceptable means acceptable for someone. Different groups of people may have different standards of acceptability.²⁴ The judges certainly argue for the answer they think the best.²⁵ But they may believe that they discover this answer and still, in fact, "legislate"²⁶, that is choose one of many, equally justifiable, alternative answers.

5.2.7. Audiences

According to Aarnio, only persons belonging to the same audience would reach agreement about what is the right answer to hard legal questions. People belonging to the same audience relative to a question, belong to the same form of life relative to this question. To comment upon the theory of audiences, I must distinguish the following points of view:

1. An earlier version of Aarnio's theory is epistemological. It points out that an answer to a hard legal question is justified relatively to an audience (if this answer is acceptable to this audience) but the audience has to be chosen: it can consist of judges, of lawyers, or of people who accidentally meet each other.¹ No recommendation follows how to choose the audience.

This theory is in agreement with my view that an answer to a hard legal question is justified if it fulfills the requirements of rationality (support, generality) and if it is based on some version of legal ideology. In this context, the theory of audiences merely points out that ideologies are expressed by people: the same ideology, the same audience.

2. In a latter work, Aarnio has suggested the following formula: That interpretation of the law for which one can achieve the rational acceptance of the widest audience has the greatest societal relevance.²

This formula is in a weak sense normative. It is a technical norm which one must follow if one wants to offer a rational interpretation of the law. To whom is this formula addressed? (a) Had a judge or a lawyer applied the formula to a hard case, the legal ideology would decide whether he did a right thing or not. This legal admissibility of Aarnio's formula depends, however, on the choice between the legal "paradigms", see infra section 7.3. and on

many other factors, not only on the deep philosophical points. (b) Aarnio's formula is certainly not applicable as a recommendation to a judge solving routine cases, who should not worry about his audience more than the doctrine of the sources of the law requires of him. (c) On the other hand, Aarnio's formula is useful for anybody concerned with a non-legal deep justification. A moralist, a lawgiver, a philosopher, a politician, etc., can - from an external, non-legal point of view - use Aarnio's formula to judge whether the best answer from the legal point of view is also the best from the point of view of the extra-legal ideology of democratic consensus which Aarnio seems to adopt. I will defend a more complex ideology; see Chapter 6 infra. In this way, pluralism increases: we have both many versions of the legal ideology and also many extra-legal ideologies used to judge the law.

5.3. THE FIFTH CONCLUSION

Let us once more see simplicity behind complexity. The "mixed" and quasi-cognitive legal reasoning is contextually justifiable from the point of view of the legal ideology. This ideology itself, including, inter alia, the doctrine of legal sources and the legal reasoning-norms, is a specialized part of our cultural tradition and of our form of life. The legal ideology is not one coherent system but rather an ever-changing cluster of normative and cognitive convictions, which one tries to partly arrange in many internally coherent but mutually incoherent systems.

We all have the regulative idea that one shall search for the right answer to legal questions, but it is difficult to interpret this idea precisely or to assume that the right answer always "exists", see also sections 4.3. and 3.3.6. It is equally difficult to assume that the right answer is a description of anything "pre-existing", for example the "pre-existing" rights. The profound reason for these difficulties, and the profound difference between the legal reasoning and the "pure" theoretical (descriptive) reasoning, concerns thus the deepest metaphysical assumptions "on what there is". From the point of view of its structure, on the other hand, legal reasoning might be less certain than science; yet it is similar to other types of reasoning, even to science, perhaps except logic and mathematics: One can present it as a "spiral", infinite from the logical point of view, yet attached to some "certain points", factually determined by our action and ultimately by both biologically-genetical and culture-bound factors.

At the end of legal justification, one finds no truth, only coherence, but it is the coherence of one's social life as a whole.

6. YARDSTICKS FOR DEEP JUSTIFICATION OF LEGAL REASONING

6.1. PLURALISM AND COMPLEXITY OF DEEP JUSTIFICATION OF LEGAL REASONING

Let me, now, change the point of view from epistemological to normative. The deep justification of legal reasoning must show that morality supports the legal conclusions (cf. supra sections 1.4.10. and 4.2.2.2.). It seems that, at least in our culture (form of life), moral justification can be protected from convincing counter-examples only if it approaches the optimal balance achieved via reflective equilibrium (cf. section 3.3.4. supra) between individual values such as individual standards of action (e.g., justice, respect for rights, inoffensiveness, benevolence, care, or love) and individual goals (e.g. self-fulfilment, virtue, pleasure, or happiness) and, on the other hand, transpersonal values¹, for example social goals (e.g. protection of freedom, order, welfare, or progress). Each of these values can be a good reason of action. But when good reasons conflict with each other, one needs good reasons to choose between them. The same kind of values can be quoted on the "ground-floor" of moral discourse, at its meta-level, at a meta-meta-level, etc. One obtains a "tree" of reasons, or the "tree" of premises of a justificatory "jump", see section 3.1.1. supra. The "tree" changes in time. The "moral good" is thus not reducible to a single formula or principle. "The good" in general is even less reducible; there is a "variety of goodness".²

Generalizing Robert Alexy's suggestion, formulated in 1979 in a discussion about cultural progress (see below), one must conclude that all these values are different aspects of justification. Each aspect can be graded, and then weighed against each other. One act of weighing depends on all other acts of weighing, for instance, weighing of justice against utility depends on weighing of utility against cultural progress (see below). As a result, we have one relation of many components. This relation constitutes the yardstick of ultimate justification for the law and legal reasoning. Maybe this relation would change in time and space, and between different people. Then, we could not generally say something like this: in the situation s_1 , the value v_1 fulfilled to the extent e_1 precedes the value v_2 fulfilled to the extent e_2 , and in the situation s_2 the opposite relation holds. Such hierarchies must rather be constructed and reconstructed ad hoc, from case to case. They will be, to use Heather's terminology, heterarchies.^{3,4} Se supra section 3.3.4. The reasoning process supporting heterarchies is based on transformations.

6.2. ON JUSTICE

Justice, constituting an important component¹ of an optimally balanced ethical theory, is itself an optimal balance² of considerations procedurally connected with (but contentually not derived from) three regulative principles:

- (M1) relevantly like people ought to be treated alike;
- (M2) relevantly weak people ought to be protected; and
- (M3) rights ought to be protected.

By "procedurally connected", I mean that these principles, and more concrete principles which they support (see below), constitute good reasons; if A gives various reasons for his opinion that an action is just (or unjust), his quoting these principles might increase "force" of the argumentation. This increase might create a problem for B, who disagrees with A, and might in some cases even justify reversal of the burden of argumentation: B must now show that A is wrong.

For some interpretations of the idea of justice, and for some people, the following inferences appear to be analytic: if my action is just, it does not violate the principle M1. Or: if my action is just, it does not violate the principle M2. Or: if my action is just, it does not violate the principle M3. These inferences are, however, not analytic simpliciter, because some would deny their analytic nature. For that reason, the inferences are transformations. On the other hand, many people accept all three inferences as correct (even if not as analytic). For them, it follows that if these principles collide in a particular case, action is just only if it approaches the optimal balance among all three.

The principle M1, relevantly like people ought to be treated alike,³ supports non-deductively (via a jump), inter alia, the following more concrete principles: Relevantly similar legal cases should be treated alike. Relevantly similar actions should be treated alike. Legal rules should be formulated in such a way that relevantly similar people, actions and cases will be treated alike. Legal rules should be interpreted in such a way that relevantly similar people, actions and cases will be treated alike.⁴ Equality determines also the commutative justice; its principle is the balance of advantages and disadvantages⁵: Good should be repaid with good. Evil can be repaid with evil.⁶ Damage must be made good.⁷ Nobody should benefit from his own wrong.⁸ A person whose interests are favoured by an action should also bear the costs of the action.⁹ Nobody should appropriate to himself a value if

some other person will thereby lose a greater value.¹⁰ There must be a reasonable proportion between the crime and the punishment.¹¹ Obviously, one can formulate more principles of this kind. They, too, might collide with each other, and then balance between them is required by justice.¹²

Who is "relevantly like" who in a given situation depends on the following factors:¹³ desert, merit, work, performance, right, duty; need, sacrifice, suffering; worth, rank, status (for instance belonging to a severely discriminated minority group), placing in time or space (e.g. in a queue); capability of using goods distributed, or to bear burdens imposed. Hence, one can formulate such principles as "to each according to his desert", and so on. A balancing of these principles is required by justice.^{14,15}

Equal treatment means either that only values and burdens at the disposal of the distributor should be distributed equally; or that values and burdens already assigned to the recipient should be redistributed (corrective justice).¹⁶

Rawls' First Principle, too, is relevant in this context: each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.¹⁷

Principle M2, "relevantly weak people ought to be protected",¹⁸ supports Rawls' Second Principle non-deductively; "Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under considerations of fair equality of opportunity."¹⁹ But, contrary to Rawls' opinion, I do not believe that any rigid priority order among principles of justice is just; nor do I believe that all rational persons, when placed in some kind of "original position" chosen in a justified way, have to give priority to any one of them.²⁰ Rawls defends a social democratic idea of justice²¹ rather than a universal one. The principle of the greatest benefit to the least advantaged is certainly just under some circumstances, but it might not be were its price to consist of a radical decrease in the production of goods, and in losses for everyone except the least advantaged, perhaps losses exceeding profit.²²

Principle M3, "rights ought to be protected,"²³ supports non-deductively a restrictive interpretation of the Roman maxim suum cuique tribuere²⁴, and Nozick's theory, which is as follows: "If the world were wholly just, the following inductive definition would exhaustively cover the subject of justice in holdings.

1. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.

2. A person who acquires a holding in accordance with the principle of justice, from one entitled to the holding, is himself entitled to the holding.

3. No one is entitled to the holding except by application of 1 and 2."²⁵

Lacking place for detailed comment, I merely affirm that, to some extent, respect for entitlement is just, but for it to be the only yardstick of justice would lead to unacceptable social inequality.²⁶

The future theory of justice must be achieved through a rational discourse between social democrats like Rawls, conservatives like Nozick, and so on. The result will be a flexible system of good reasons, weighed against each others again and again in new situations, in order to achieve constantly renewed reflective equilibrium. Lexical orders of these good reasons will have a limited and changing sphere of application. They will be heterarchies ad hoc, not hierarchies.²⁷

6.3. CULTURAL PROGRESS

6.3.1. Functional Justification of Law and Its Limits

Let us, now, say something about transpersonal values.

Toulmin justifies value-statements via pointing out their connection with a given culture¹. One can thus answer the question "is a given method M of legal reasoning justified?" by pointing out that a given culture actually practices M.

Another theory is sociological functionalism. One answers the question "is a given method M of legal reasoning justified?" by pointing out the social functions of M. There are many interpretations of functions² and functionalism. One can, e.g., justify a given practice of legal reasoning by pointing out that it contributes to the self-regulation of the social system as a whole.³ This idea is akin to Petrażycki's assumption that the legal order is evolutionarily, unconsciously, but perfectly, adapted to its social functions.⁴

Still, the deep justification of evaluative legal reasoning via cultural uniformity and functionalist arguments merely leads to the next question: Why is a contribution to the self-regulation of a social system justified? Any empirical or functional justification presupposes - within some limits - the rule "what exists is justified." Only a fanatical conservative accepts

this rule without exception.

6.3.2. Efficiency in Promoting Cultural Progress as a Fragmentary Yardstick of Justification of Evaluative Steps in Legal Reasoning

To avoid counterintuitive examples, one must adopt more dynamic point of view. An optimally balanced deep justification of legal reasoning must take into account both individual values, for example justice, and transpersonal values, for instance cultural progress.

Cultural progress consists of the following elements:¹

- I. (a) increase of cognition potential; a higher culture has assimilated more knowledge about the world than has a lower culture;
(b) increase of moral potential;²
(c) increase of aesthetical potential;
- II. necessary precondition for I(a)-(c): a certain degree of economic and technological progress.

One must judge economic and technological progress in the long run, not according to short run economic considerations. In disagreement with the prophets of doom, I think that, at the moment, human culture can both qualitatively and quantitatively grow, linearly or even exponentially. This gives cultural progress a high relative importance as compared with such values as, for instance, increased equality. At least in Sweden, we are much closer to maximal equality than to maximal development of culture.

True, the term "cultural progress" is vague. It has, however, a procedural value. Assume that people agree that cultural progress is valuable. Assume that a person A gives various reasons for his opinion that a given practice of legal reasoning promotes cultural progress. A's argument might create a problem³ for B, who disagrees with A, and might, in some cases, reverse the burden of argumentation: B must now show that A is wrong. Moreover, Robert Alexy has outlined one of many possible ways to construct a more precise normative theory of cultural progress, via singling out many aspects of progress, degrees of their fulfilment, and many interdependent methods of weighing the aspects against each other.

I have pointed out, in the section 1.4.10. *supra*, that it is morally better for the society to establish an institutional legal order which leads sometimes to morally objectionable conclusions, than to force societal actors

to autonomously evaluate all the complex situations arising in modern society. But why is it better to establish the quasi-cognitive legal reasoning than to literally follow the enacted law, regardless its moral quality? The answer is that this reasoning is coherent with the tradition of European culture. This tradition is a complex and unique mixture⁴ of such legal factors as the protection of an individual's entitlement and demand of an individual responsibility; such political factors as the existence of many competing states from which a dissident always could emigrate; religious and philosophical factors, like respect for human person; economic factors, like decentralized market economy; and administrative factors, such as development of relatively fair and impersonal bureaucracy. The quasi-cognitive legal reasoning is coherent with this tradition. The possibility of its progress depends on the progress of the tradition as a whole.

6.4. THE SIXTH CONCLUSION

Back to simplicity behind complexity. One possible deep justification of legal reasoning consists of evidence that it constitutes a relatively optimal compromise between individual values (e.g. utility and justice), and transpersonal values (e.g. cultural progress). Many of these values, for example justice and cultural progress, consist themselves in optimal balance of good reasons, or at least discourse about them aims at such a balance. When good reasons collide with each other, one needs good reasons to choose between them. One obtains a changing and growing tree of reasons. Priority orders of reasons are "heterarchies" ad hoc, based on "jumps", not fixed hierarchies.

7. LEGAL RESEARCH, GROWTH OF SCIENCE AND MORAL THEORY

7.1. LEGAL RESEARCH ABOUT THE SOURCES OF THE LAW?

7.1.1. The Problem of Legal Science. Legal Dogmatics

Let us now discuss the question whether the theory of science can provide the deep justification of legal reasoning. In this context, I will discuss only the Continental "legal science", because it is the most systematic part of legal thinking, most easily compared with science. The analytically-evaluative study of the substance of law traditionally occupies the central position in each branch of European "legal science", that is, in the systematic exposition of civil law, criminal law, public law etc. of a given European country. The standard German word for it is Rechtsdogmatik. I will call it "legal dogmatics"; sometimes I use another term, "analytical study of law"; some writers call it "doctrinal study of law". Legal dogmatics consists of the interpretation and systematization of (valid) legal norms. It is often connected with other kinds of legal research such as legal sociology, legal economics, legal history, comparative law, jurisprudence, legal philosophy, and so on. Legal research always comprises activities of many kinds.¹

Legal dogmatics is not identical with Anglo-American commentaries and textbooks of law. It is more systematical, less case-oriented. One can say that the European legal scholar claims to be a scientist, whereas his Anglo-American counterpart is a moralist in disguise. Legal dogmatics has a great practical importance for legal education, legislation and legal practice. European law, especially German, is often "the law of professors" (Professorenrecht), while the Anglo-American law is to a great extent "judge-made". Many European judges would like to be professors of law whereas many British or American professors would prefer to be judges. Yet one should not exaggerate the differences. Many things I say below about the legal dogmatics can also be said about Anglo-American legal research.

Legal dogmatics is a rational activity, aiming at logical consistency, justificatory support and generality (see supra Chapter 4 passim). The following research-norm is thus acceptable:

- (D1) Each proposition expressed in the legal dogmatics, if anyone casts doubt on it, should be justified by reference to at least one theoretical or practical argument.²

All the stronger reasoning-norms (see Chapter 2 supra), acceptable in the legal practice, are also applicable to the legal dogmatics. In other words, the latter, at least in part, uses a method similar in principle to judicial method.³ Of course, there are also some differences. For example, compared with judicial method, legal dogmatics lacks the decision-component; it is more abstract and less bound to a "given" case; it deals with changing examples of real and imaginary cases; see supra section 2.3.7. note 2 and 2.3.9.4. note 3; its recommendations are not always categorical but sometimes hypothetical: if an evaluation W is accepted, one should do X. The most profound difference consists in the fact that legal dogmatics often claims to be more rational than legal practice, that is, more oriented towards generality and argumentative support, see section 4.2. supra. The similarities are, however, far deeper than the differences.

Legal dogmatics thus consists of a description of the literal sense of statutes, precedents, etc., intertwined with many references to the may-sources of the law, and with many substantive reasons; this mixture supports suggestions as to how one should read the sources of the law, as if they were coherent, rational, morally right, just, and so on. Legal dogmatics is quasi-cognitive, in the same sense as legal practice, see supra section 3.3.1. and infra section 7.3., since despite its evaluative character it often describes itself as aiming at cognition of the valid law or even legal sources. Yet one can, in principle, present legal dogmatics as a sequence of statements, either descriptive or evaluative, or at least as a sequence of the "theories", that is, clusters of descriptive and evaluative statements or operations. Some of these constitute doctrines whose primary intention is evaluative, for example doctrines according to which punishment should serve the purpose of reforming the criminal; of retribution; of deterring the criminal or others from committing crimes; etc. Others constitute cognitive theories whose primary intention is descriptive, for example theories explaining such historical facts as abolishing the capital punishment; or theories describing the system of the sources of the law.

Legal dogmatics often uses such auxiliary implements as conceptual analysis,⁴ intentional and causal explanation, and creation of legal principles. Non-legal theories are often used, as well; let us mention the role of theories of causation in the law of torts and in criminal law.⁵ Models,⁶ idealizations, metaphors,⁷ etc., are also constructed. According to Ihering, for instance, the lawmaker and the legal scholar speak about creation, change, association and cessation of rights, and even of their elasticity, in the same way as of the creation, change, association, destruction and elasticity

of physical objects.⁸

Because of the quasi-cognitive nature of legal dogmatics I will call its products "theories" (with quotation marks). The jurists often identify as juristic "theories" various clusters of propositions expressed in the analytical study of law. Dreier distinguishes between interpretative theories, norm-suggesting theories, qualifying theories, institution theories, principle theories, fundamental-concept theories, and branches-of-the-law theories.⁹ Several critics, however, labelled the study of law as valueless (Kirchmann),¹⁰ unscientific (Lundstedt),¹¹ metaphysical (Hägerström),¹² and so on.

7.1.2. Formal Requirements of Science, Methodology of Problem-Solving and Legal Dogmatics

Still, the legal dogmatics fulfills many requirements typical of science.

Science is "inter-subjective": one expects a high degree of consensus among experts.¹ Legal dogmatics to some extent conforms to this requirement, especially concerning routine cases, relevance of the sources of the law, and assessment of acceptability of legal arguments.

Science aims at formulating universal laws of nature.² From a number of possible formulations of a law of nature, it chooses the most concise and elegant.³ Legal dogmatics does not fulfill the requirement of universality,⁴ but it produces generalizations and prefers simpler theories over more complex ones.

In Popper's opinion,⁵ the history of science is a history of problem situations⁶ and their modification through attempts to solve problems.⁷ (A problem situation is a problem together with its background, normally taken for granted⁸.) According to Laudan, it is rational for one to accept the paradigm that solves most of empirical problems and avoids most conceptual problems.⁹ As conceptual problems he counts inconsistency and vagueness of theory, logical incompatibility of theories and, finally, incoherence: "a theory emerges which ought to reinforce another theory, but fails to do so and is 'merely compatible with it.'"^{10,11} Legal dogmatics, as well, tries to solve a kind of empirical problems, for instance when it seeks to determine which solution of a case best corresponds to the sources of the law. It, too, avoids conceptual problems. On the other hand, problems and solutions in natural science and in legal dogmatics are not identical.

7.1.3. The Legal "Data"

According to the simplest empiricist idea, the characteristics of a science are as follows:

1. The basic material of a science consists of the observed data.
2. The basic propositions of a science are those which describe data.
3. Scientific laws and theories are generalizations concerning basic propositions describing data.

But what is "observation of data"? Observation is "theory-laden" and dependent upon language. Let us consider a simple example. My eye registers a changing field of colors and shapes and I recognize a datum, or a fact: this swan is white. A "statement such as 'This swan here is white' may be said to be based on observation. Yet it transcends experience... For by calling something a 'swan', we attribute to it properties which go far beyond mere observation...".¹ Observation of a swan is more than a simple registering of "flashes, sounds and bumps"; it is "a calculated meeting with these as flashes, sounds and bumps of a particular kind".^{2,3} Moreover, when I call something "a white swan", I do it in a language that I share with other people. This presupposes the following meaning postulate: Under normal conditions of observation, whoever sees that X is white should be ready to accept the statement "X is white", and whoever sees that X is a swan should be ready to accept the statement "X is a swan". Whoever refuses to do this does not know English.⁴

Since all observations are theory-laden,^{5,6} many thinkers emphasize the existence of a theory circle: one judges a theory in view of data and data in view of a theory. I would, however, accept the opinion of, inter alia, Hempel, Popper and Sneed, according to which one may distinguish between T-observational and T-theoretical terms with regard to the theory T.⁷ Data₁ justifies Theory₁, which justifies Data₂, which justifies Theory₂, which justifies Data₃, and so on. The description of Data₂ thus presupposes T-theoretical terms with regard to Theory₁ but not with regard to Theory₂.⁸ (This representation is possible even if the theory T affects the world picture and via the world picture indirectly affects its own observational terms. These are then only indirectly T-laden, whereas the T-theoretical terms are directly T-laden.)

Given that it is thus meaningful to distinguish between theory and data, what component of legal dogmatics is relevantly similar to observational

data? Legal dogmatics uses many kinds of data, some specifically legal, some not. Descriptions of various social and economic factors constitute an example of the latter.⁹ Let us now deal only with the specifically legal data, that is, the data informing us about the content of the law. There are three possible answers to the question what constitutes these specifically legal data:

1. The data of legal dogmatics consist only of the sources of the law,¹⁰ or solely of the sources that are mandatory in the wide sense, that is, must or should be used in justification of legal decisions.
2. The (quasi-)data of legal dogmatics consist of evaluations generated¹¹ by the legal scholar; the term "evaluations" designates value-judgments or normative judgments, individual or general.
3. The "data" of legal dogmatics consist of all premises for its reasoning, both of the sources of the law, and of evaluations.

Regardless which answer one adopts, some obvious differences remain between data in science and "data" in legal dogmatics. The former consists of natural phenomena, such as planets and animals, the latter of "meaning-bearers" such as evaluation or norms. (On the other hand, science may observe such complex entities as electro-magnetic fields or black holes.)

7.1.4. If the Legal Dogmatics is About the Sources of the Law, Then It Is Not Governed by the Regulative Idea of Truth

Assume, at first, that legal "data" (i.e. legal "facts") consist of, broadly speaking, mandatory sources of the law, such as statutes and precedents.

Most specialists in law, independently of their "paradigm", admit creative interpretation of the sources. The traditional interpretation-norms, construction-norms and collision-norms are hardly appropriate as means for achieving a true description of the sources of the law. Consider, for instance the collision-norms C6-C9. To understand them as means of showing that the sources of the law, which appear incompatible, in fact are compatible, seems strange. Their purpose is rather to rework the content of these sources, to make them compatible.

If a scientific description does not correspond to the world, the description is false and the world does not change. A juristic "description", however, not corresponding to the legal sources, can change the law. Communis error facit ius. One cannot thus regard the legal dogmatics as merely produ-

cing true (or false) theories about the sources of the law. For the same reason, one cannot regard it as merely producing true (or false) theories about such things as the actual behaviour of people, predictions of what courts will do, the content of the established legal ideology,¹ the social acceptance of the law, the historical intention of the legislator, the hypothetical intention of the legislator, and so on.^{2,3}

In order to further confirm this conclusion, I will now examine some difficulties resulting from the application of two classical methodologies of science, inductionism and falsificationism, to the legal dogmatics; see infra sections 7.1.5. and 7.1.6.

7.1.5. Legal Dogmatics and Induction

There are many views about the justification of a theory by means of observation, inter alia inductionism. According to this view, a theory is probably true if it constitutes an inductive generalization of observation.¹ Induction is thus the proper method of empirical research² leading to general laws of nature.³ One can express the pattern of induction as follows:

Premise:	(1)	All known objects, belonging to the class C, have the property P
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Conclusion:	(2)	All objects (even unknown), belonging to the class C, have the property P.
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More precisely:

Premise:	(1')	$x_1, x_2, x_3, \dots, x_n$ which are C are P
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Conclusion:	(2')	$x_{n+1}, x_{n+2}, x_{n+3} \dots$ which are C are P
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Reasoning by analogy, quite similar to induction, can be expressed in the following manner:

Premise:	(1 ^A)	Objects x and y have common properties $C_1, C_2, \dots, C_n$
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Conclusion:	(2 ^A)	Objects x and y have further common properties $C_{n+1}, C_{n+2}, \dots$
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Justification of induction is, however, controversial.⁴ If disciplines such as biology and sociology, supporting induction, are themselves inductive,

they can only justify induction in a circular way. On the other hand, both inductive and non-inductive validation of laws of nature are acceptable, albeit not all examples of induction are connected with laws of nature.⁵

Legal dogmatics is filled with examples of generalizing the sources of the law via reasonings whose established names are "reasoning ex analogia" and "legal induction".⁶ One can express the "legal induction" in the following manner:

Premise:	(1*)	$x_1, x_2, x_3 \dots x_n$ which are C should (must in the normative sense, ought to, in German <u>sollen</u>) be (treated in the way) P
Conclusion:	(2*)	$x_{n+1}, x_{n+2}, x_{n+3} \dots$ which are C should be (treated in the way) P

Prima facie, one can interpret both the premise 1* and the conclusion 2* either as norms or as cognitive propositions stating that an established norm exists, for instance that a source of the law actually expresses not only the norm 1* but also the norm 2*. The first interpretation is more correct, since a jurist can draw the conclusion 2* even if he does not believe that there is an already established norm 2*, expressed in the sources of the law, in various practices, etc. In other words, whereas the "normal" induction leads to cognitive theories or hypotheses, the legal induction, including the legal reasoning ex analogia, often leads from a norm (very often from an established, legally valid norm) to the creation of a new norm.⁷ Moreover, the ordinary induction can be justified, if at all, by metaphysical assumptions concerning uniformity of nature etc.⁸ One cannot justify the creation of a new form in such a manner. Its justification is rather based on another norm, for instance, on the principle of formal justice: "like people should be treated alike".⁹

All induction is a transformation (a non-deductive mode of reasoning). The norm-creating legal induction is, however, quite special because its relation to evaluations is more essential.

7.1.6. Legal Dogmatics and Falsificationism

According to Popper, the proper¹ method of scientific research consists of formulating bold hypothesis; one should try to falsify hypotheses; one accepts them as long as they are not falsified.^{2,3} The growth of our knowledge is the result of a process closely resembling what Darwin called natural selec-

tion, that is, the natural selection of hypotheses.⁴ The progress of science leads to ever deeper explanation, ever greater predictability, ever greater exactitude and ever greater deductive rigor but not to ever increased probability of hypotheses.⁵

Falsificationism is confronted with some problems.⁶ One of them is the Duhemian dilemma. Suppose the theory T combined with the auxiliary hypothesis A implies e but observation suggests non-e. For instance, physics (T) combined with the hypothesis of expanding universe (A) implies a given position of a star (e), but the star is not exactly where it should be (non-e). What should one do? "(i) One may challenge the derivation by showing that e does not in fact follow from T.A. (ii) One may show that the observation which purports to show non-e is unreliable. (iii) One may reject A. (iv) One may reject T."⁷ How should one choose? To solve the Duhemian problem, Popper has formulated some methodological rules. The most important is the rule that ad hoc auxiliary hypotheses, introduced in order to save the theory while not increasing its falsifiability, are forbidden.⁸

It is doubtful whether legal dogmatics consists of constructing and testing falsifiable hypotheses, since it is not clear what facts these hypotheses deal with. Neither is it clear what the term "to falsify" means in the present context. Finally, one can ask the question whether Popper's methodological rules are applicable to legal reasoning. Perhaps they are analogous to the juristic source-norms, interpretation-norms, construction-norms, collision-norms, etc. These norms of legal reasoning have, however, a content which Popper's rules do not. Popper has formulated universally valid, unchanging, methodological rules whose function is to adapt theories to data. On the other hand, the "methodological rules" of legal dogmatics are continually re-interpreted, changed, and adapted to the very legal "data" (sources) and "theories" whose relation they regulate.⁹ As a result, there is no sharp difference of status between the legal "data" (sources), legal "theories" and legal "methodological rules". Jurists try at any price to mutually adapt the "data", "theories", and norms of legal reasoning to each other, whether in an ad hoc manner or not.

7.2. LEGAL DOGMATICS AS AN EVALUATIVE DISCIPLINE

7.2.1. Assumption that the Legal "Data" Consists of Evaluations

Assume, now, that the "data" of legal dogmatics include evaluations generated

by legal scholars confronted with legal problems. This assumption leads to interesting conclusions provided that one adopts a sophisticated theory of science.

7.2.2. Methodology of Research Programs and Legal Dogmatics

I agree that induction is a good logical reconstruction of science (see sec. 7.1.5. note 4) and that Popper's theory gives insight into the purpose of science. But neither inductionism nor falsificationism give effective criteria of scientific progress. Several sociologically oriented philosophers try to fill this gap.

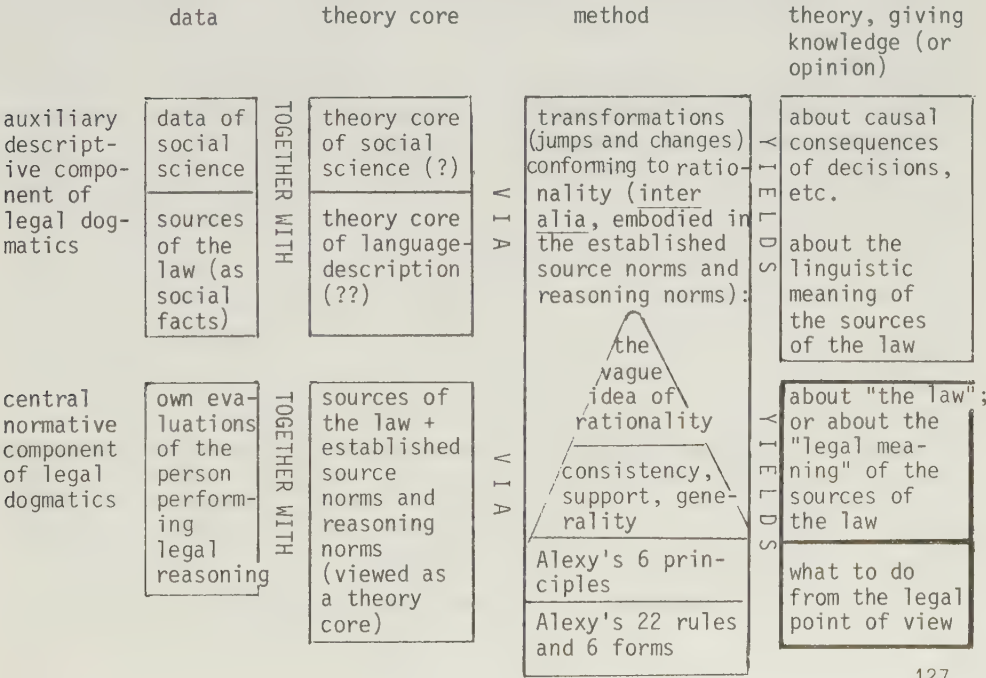
Lakatos has suggested the following methodology: a given research program (a series of theories) contains a hard core protected by auxiliary hypotheses; one ought to direct counterexamples against the auxiliary hypotheses, never against the hard core.¹ Within the program, one develops more and more complex theories, rejecting more and more over-simplified assumptions. The research program is no longer progressive but rather degenerative, and often gives way to another one with another hard core, when it no longer produces theories with greater and greater empirical content.² (Lakatos does not say precisely when the old program should be abandoned. "The older program may actually be degenerating though this need not be true."³ Moreover, the degenerating program may become progressive again.^{4,5})

Aaart de Wild has applied Lakatos's ideas to the descriptive component of legal dogmatics: A series of juristic theories is progressive, if the next theory within this series explains and sets aside a greater number of anomalies than its predecessors.⁶ "Anomaly" is defined as deontic incompatibility of norms.⁷ A degenerating legal "research program" is no longer capable of producing theories that set aside an increasing number of deontic incompatibilities.⁸

Let us now apply Lakatos's methodology to the evaluative component of legal dogmatics. The evaluations, continually created by the person performing legal research, are then analogous to the observational data.⁹ Of course, we must pay attention to the epistemological and semantical difference between the practical evaluations and value-statements and, on the other hand, theoretical data and data-propositions. This difference is, however, compatible with analogy between the position of evaluations in the structure of legal dogmatics and the position of data in the structure of science. If the evaluations are analogous to observational data, then the sources of the law

are analogous to theories.¹⁰ Some of these sources, namely the must- and should-sources, such as statutes and precedents, are analogous to the theory core of the legal "research program". When a legal scholar produces new "theories", or when he generates new evaluations (analogous to data), these "theories" and evaluations may affect the interpretation of the must- and should-sources (analogous to the theory core) but the literal text of the sources is fixed and may be changed only by lawgiver or precedent-establishing courts. A scientist tries to interpret the "hard core" in such a way that apparent incompatibilities within it disappear; similarly, a legal scholar explains away incompatibilities of the sources of the law. At the same time, however, the descriptive component of legal dogmatics involves various theories developed in social sciences, concerning, for example, linguistic meaning of words used in the legal sources; causal correlations between judicial decisions and other social facts; attitudes prevailing in the society or in its "ruling circles", etc. These theories are based on the societal data in the usual sense. Consequently, a jurist treats the sources of the law in two different manners. If he regards his activity as a description of the sources, then the sources are analogous to the observation data. But if he regards his activity as adaptation of the sources to his evaluation of the "demands of the life", then the sources are analogous to a theory core.¹¹

One can thus describe the structure of legal dogmatics, as follows:



This applicability of Lakatos's methodology cannot, however, obscure some secondary differences between the legal dogmatics and ordinary science. Whereas the hard core of an ordinary research program is produced by scientists, the "hard core" of a legal "research program" is created by legislators and precedent-establishing judges, employed as institutionalized "scientific revolutionaries". Moreover, an additional differentiation obtains within the legal "core" between the must-sources and might-sources. Furthermore, a part of the legal "hard core", namely the precedents, changes constantly, since the courts keep creating new precedents and eliminating old ones. Finally, a decision to change a research program involves a transformation, since one cannot deduce the decision from the competing programs and Lakatos's methodology; a decision to change the mandatory sources of the law also involves transformations, but the role of moral evaluations in such a decision is exceptionally great.

7.2.3. Sophistication of Theories and Legal Dogmatics

One can also reach some interesting results by applying another methodology, elaborated by Sneed, to the legal dogmatics. Sneed has regarded theories as mere mathematical structures, giving some metrics (yardsticks), and axioms which these metrics fulfill. One can apply a theory to models, that is, to fragments of empirical reality ("empirical structures"), containing quantities which one can measure with the metrics. Should the theory not fit a given model, it is not falsified, since one can look for another model. A theory T, is reduced to a more progressive one, T', if T' is more sophisticated: what T says T' can say but not vice versa.¹

Consider now, for instance, the older and the newer Scandinavian "theory" of ownership, as compared by Aarnio.² The old "theory", T, regarded ownership as a substance which at a certain moment can belong to one and only one person. The newer Scandinavian "theory" of ownership, T', says that to be an owner of a thing is the same as to be legally protected against certain other persons. Many kinds of protection exist; it is thus possible to be an owner in some respects but not in others. Aarnio has concluded that T' is more developed than T, because it can describe situations T cannot.³ T thus forces a jurist to press all the conceivable relations between a seller and a buyer into two classes: either the seller is an owner and the buyer not, or the buyer is an owner and the seller not. On the other hand, T' allows a jurist to speak about a third kind of situation, that is, the seller is an owner

in some respects whereas the buyer is an owner in other respects.

T' is thus better than T, since it allows the legal researcher to grasp distinctions conceptually inaccessible to T and, at the same time, relevant both from the point of view of evaluations (the legal "data") and from the point of view of the legal sources (the core of legal "theories").

7.3. "PARADIGM" OF LEGAL RESEARCH

7.3.1. The Paradigm Methodology and Some Evolutionist Points

Legal dogmatics is divided into some schools. In order to understand the character of the discourse between the schools, one can apply the paradigm methodology.

According to Kuhn, one should judge scientific theories as parts of a broader totality called a paradigm.¹ Kuhn has distinguished between two concepts in order to explicate this term. The first concept is that of an "exemplar", a concrete scientific achievement imitated by scientists in subsequent research. The second is that of a "disciplinary matrix", a network of evaluations, norms, symbolic generalizations, basic beliefs, etc., shared by a group of scientists.² If a scientist cannot solve a puzzle within the paradigm, this does not falsify either the whole paradigm or theories essential to it but it "falsifies" his scientific skill. Doubt concerning the paradigm is excluded from the scientific universe of discourse. Only during a phase of scientific revolution does a new paradigm prevail over the old.³ Paradigms are incommensurable inter alia because "in the transition from one theory to the next words change their meanings or conditions of applicability in subtle ways."⁴ "To the extent... that two scientific schools disagree about what is a problem and what a solution..., each paradigm will be shown to satisfy more or less the criteria that it dictates for itself and to fall short of a few of those dictated by its opponent."⁵ Kuhn later added that scientific revolution "need not be a large change", and "occurs regularly on a smaller scale".^{6,7}

According to Toulmin, a paradigm changes gradually,⁸ different components of it changing at varying rates. For this reason, at each moment certain criteria of rationality exist, common to the old and the new theory, making possible a rational discussion between their supporters.⁹ In Trançoy's opinion, as knowledge evolves, some theses pass from the realm of theory (continually tested in the light of the norms of inquiry) to the realm of what we all,

laymen and learned, actually accept (often tacitly) and no longer test.¹⁰

The great popularity of paradigm methodology results from the fact that it simultaneously emphasizes two things. The first is that science must take something for granted, must have its framework and its starting-points. I agree with this idea but I have argued that the framework is quite flexible and a part of it is common for all people. See supra chapter 5 passim, especially sections 5.1.6. and 5.1.7. The second thing is the incommensurability problem. Again, I must agree that the thesis of incommensurability has a sound core. But incommensurable theories can be vaguely compared within a "super-paradigm" (see supra section 5.1.6.). Moreover, I agree with the following remark: "we can come to understand what previous scientists meant by the terms within their theories. On occasion we may see that they meant the same as we do, and on occasion we may see that they meant something different. Even in the latter case we may be able to determine that they were talking about the same thing... (W)e... can discover that in spite of the difference in sense there is sameness of reference."¹¹ But even if Kuhn's theory must be interpreted cautiously and perhaps must be weakened, it gives us a valuable starting-point for our discussion of the legal research.

7.3.2. Is the Concept of "Paradigm" Applicable to Legal Research?

According to Aarnio, each "legal dogmatical paradigm" consists of the following four components: (1) a set of philosophical background assumptions, commitments, or both for instance as regards the object of legal research; (2) assumptions regarding the sources of the law; (3) a cluster of methodological rules and principles; (4) a set of values common to the scholars working within the paradigm.¹

Legal dogmatics has thus some starting-points one should take for granted. Doubt concerning these points is excluded from its universe of discourse.² Yet it contains various schools that, unlike paradigms of science, coexist simultaneously³, have no sharp boundaries, and may even mutually cooperate in solving problems. One can thus contrast between several types of legal thinking. One such contrast exists between the way of thinking dominating Common Law countries and the way of thinking dominating Continental legal culture. From another point of view, one may discuss various types of legal dogmatics, simultaneously or in different historical periods existing in many or all modern countries⁴, for example (1) the formalistic, scientifically oriented study of law; (2) the rule-sceptical, socially oriented study of law; (3) the "mixed", scientific and socially oriented study of law. I will now

make brief comments about these three types, but I doubt whether they should be called paradigms. Perhaps there is only one standing paradigm of legal dogmatics, more or less closely connected with the "formalism". Antiformalist movements have been unable of creating a new practically working paradigm.⁵

7.3.3. A Science of Law? Some Remarks on Formalistic Study of Law

The first ideal type (or school) of legal dogmatics emphasizes its scientific nature, albeit "in the wider continental usage"¹ (science du droit, Rechtswissenschaft). Its object is "positive" (valid) law.² It distinguishes sharply between the "binding" sources of the law, such as statutes,³ and the "non-binding" ones, for instance text-books.⁴ Its method is complex and specifically juridical; it emphasizes justice, coherence and rationality⁵, see section 4.2. supra; it considers the law as a self-sufficient system⁶ or at least regards the "legal ought" as a different category, not reducible to moral obligation, see section 1.4.10. supra; it considers the activities of the judge and jurists as merely descriptive⁷ but, at the same time, admits evaluative steps in legal justification, see supra sections 3.3.1. and 7.1.1.; finally, it makes a sharp distinction between the problem of legal validity and legal interpretation.⁸ The source-norms, interpretation-norms, construction-norms and collision-norms, discussed in the present work, have been influenced by this formalistic study of law. Finally, the traditional (Continental, European) formalistic study of law regarded very highly the idea of objective science.

Within this tradition, Conceptual Jurisprudence (Begriffsjurisprudenz) was the school which held the strongest expectations.^{9,10} It reached its peak of popularity in Germany during the second half of the 19th century,¹¹ and produced the German civil code (BGB, 1896). In order to derive appropriate decisions from incomplete and old sources, Conceptual Jurisprudence worked with "conceptual pyramids". According to Puchta (1798-1846), for example, a servitude is first a right, then a property-law right, then a property-law right to an object belonging to another person, then a property-law right to real estate belonging to another person, then a right to use in some way real estate belonging to another person. Conceptual Jurisprudence combined such conceptual pyramids with corresponding pyramids of legal principles. One tried, for instance, to find out general principles about all rights, then about all property-law rights, then about all property-law rights to an object belonging to another person, and so on. One thus inductively ascended to higher and higher principles; by deduction from these one

could enrich the law with new norms.¹²

The strong side of Conceptual Jurisprudence lies chiefly in the fact that is developed valuable systematization of law¹³ and organized legal sources into a coherent whole. Its weak side consists in reluctance to adapt general principles to concrete evaluations. Consider, for instance, the Roman principle caveat emptor, according to which the buyer must bear costs of damage occurring by accident during the transport of the goods to him. Conceptual Jurisprudence was prepared to accept the following consequence: Should a scoundrel sell a ship's cargo to five people and the cargo be lost at sea, he may demand the whole price from each (and thus recover five hundred percent of the price). Instead of saying "the buyer must bear costs", one should, of course, say "the buyer must bear costs unless strong reasons point to the contrary".¹⁴

7.3.4. "Legal Science" versus "Legal Politics". Socially Oriented Study of Law

Partly in reaction against Conceptual Jurisprudence,¹ a whole cluster of more or less rule-skeptical and socially-oriented schools evolved throughout the world.²

The socially-oriented study of law combined the "free" views about the nature of judicial method (sec. 2.3.5.) with restrictive ideas of objective science; this combination implied, inter alia, that science ought to be value-free. Consequently, if the legal dogmatics is to be scientific, it must have a very different method than have the judges.

1. Its proper object is thus the law in its social context. It should study not only legal norms but also their social causes, results, goals and functions³, the wants and interests behind the law⁴, etc. It should sociologically study the "real law" or "law in action", embodied in actual decisions of courts and authorities, not "law in books."^{5,6} It should predict what rules will be applied by tribunals in future legal decisions.⁷
2. One can characterize the doctrine of the sources of the law, accepted by the socially-oriented study of law, as follows: The role of the sources which, from the legal point of view, must or should be taken into account is restricted. The list of the sources which may be taken into account is extended. One can openly criticize the mandatory sources of the law for philosophical, moral and even poli-

tical reasons.

3. Concerning the method of socially-oriented legal study, the following points are interesting:

- a) It had no confidence in traditional norms of legal research. Consider, for instance, the collision-norm known as the lex superior (cf. section 2.3.10.7. infra) from which it follows that one must not apply a statute insofar as it is incompatible with the constitution. In Denmark, the right of courts to review the material constitutionality of the statute is restricted, and Ross thus concluded that rather the contrary principle, "lex inferior" applies.⁸
- b) The main objective of socially-oriented legal study was to find legal means to achieve relevant goals.⁹ Moreover, some representatives of this school believed that one might present the "correct statement of valid law" only "in many concrete and narrow generalizations", not "in a limited number of abstract and wide generalizations".¹⁰

In an idealized model, constructed to facilitate understanding (not to describe historical details), one can represent the socially-oriented study of law as if it has consisted of two variants:

1) First variant-Dualism. Legal dogmatics was to be split in two parts: scientific description and unscientific evaluation. The scientific part (or aspect) of legal dogmatics sensu stricto should describe objectively the sources of the law, without evaluating "hard" cases.¹¹ (The scientific aspect of "legal politics" should describe objectives predominant in influential social groups¹² and causal correlations operative in relation to these objectives.)

2) Second variant-Evaluative Monism. In practice, however, it was difficult to separate the value-free ("scientific") and evaluative components. Legal researchers performing legal dogmatics sensu stricto, have also a duty to perform legal-political reasoning.¹³ When performing legal politics, legal researchers should be evaluatively independent; they should not always accept evaluations predominant in influential social groups.¹⁴

The socially-oriented study of law, although inspired by a strict scientific ideal, nevertheless had to continually increase the role of "unscientific" evaluations in its own research. At the same time, the devices of juristic evaluations, applied a few generations ago by the formalistic "school", were unacceptable. This situation allowed one to use nothing but

a quite free search for what is just here and now (Viehweg).¹⁵ One can ask the question whether the socially oriented study of law actually created a paradigm, successfully competing with the formalist study of law. If not, then it merely constitutes "the evidence of profound crisis in the legitimacy of the standing paradigm of normal science"¹⁶ of law.

7.3.5. The Scientific and Socially-oriented Study of Law

It seems that legal dogmatics should be, and to some extent already is, both scientific and socially-oriented (evaluative). The legal researcher should thus both describe and harmonize the legal sources such as statutes and precedents, and adapt them to evaluations he endorses.¹

7.4. THE SEVENTH CONCLUSION

All "schools" of legal dogmatics, at least to some extent, recognize its quasi-cognitive character. It claims to base its conclusions on the valid law but in fact adapts them to continually created evaluations. This quasi-cognitive and "mixed" character of legal dogmatics makes it difficult to judge it in view of some versions of philosophy of science. Neither inductionism nor Popper's falsificationism can thus serve as a yardstick of scientific progress in the legal dogmatics. The inductionist yardstick is distorted by the problem of norm-creating induction. Popper's yardstick, that is, application of methodological rules in order to eliminate false juristic hypotheses, is dubious, inter alia because it is not clear with what facts these hypotheses would deal and because the methodological rules in the law are obscure. On the other hand, Lakatos's yardstick of scientific progress, that is, production of theories assuming the same hard core and possessing greater and greater empirical content, is applicable to legal dogmatics. It is, however, applicable only if we define the mandatory sources of the law as "the hard core of legal theories", not as the "legal data". If one adopts this definition, Sneed's yardstick of scientific progress is also applicable to legal "theories". The paradigm methodology is applicable, too, thus emphasizing two things. The first is that legal dogmatics must take something for granted, the second that various schools of legal study might be incommensurable. On the other hand, one may doubt whether there exists more than one paradigm of legal dogmatics.

NOTES

Introduction

- 1 The term suggested by Robert S. Summers.
- 2 Cf. Popper 1959 p. 31: "justification or validity (Kant's quid iuris?). Cf. Wróblewski 1979 p. 196: "Justification sensu largo ... answers the open question of the 'why?'-type". Cf. Aarnio 1977 p. 44: "justification ... concerns the question under what conditions an assertion (conclusion) can be said to be valid."
- 3 Cf. a similar distinction by Hare 1981 p. 188.
- 4 Cf. e.g., Habermas 1973 pp. 255 ff.; Alexy 1978 pp. 155 ff. with references to Apel etc. Cf. infra section 5.1.6.
- 5 The mode of presentation suggested by Tore Nilstun.

1.1. title

- 1 Cf. Aarnio, Alexy and Peczenik 1981 part I (pp. 136-158). Cf. Peczenik 1979:2 pp. 47 ff. (Peczenik 1979:3 pp. 163 ff.); Peczenik 1979:4 sections 1.4. and 1.5.; Peczenik 1979:5 p. 16 and Peczenik 1980 p. 240.

1.1.1.

- 1 Another example: perception that something is valuable.
- 2 One may argue that the first level is fictitious, because we never perceive a field of colours and shapes, but always objects. Still we can withhold the thought of objects and force ourselves to perceive only such appearances as colours and shapes. Then, we can make the step from them to the objects. (The solution suggested by Hector-Neri Castañeda.) Cf. section 7.1.3. notes 2 and 3 infra.

1.1.2.

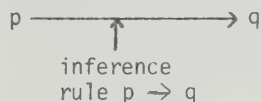
- 1 See, however, explanations in section 3.1. infra.
- 2 Cf. sections 3.3.3. and 4.3. infra.
- 3 Nagel 1961 p. 74. Cf. von Wright 1974 pp. 81 ff. and Peczenik 1979 p. 345.

1.1.3.

- 1 Cf. Aarnio, Alexy and Peczenik 1981 section I.3.1. (pp. 138 -139), written by Robert Alexy.
- 2 Transformation rules should be distinguished from more profound rules justifying the very transformation rules.
- 3 Alexy has pointed out what follows (cf. Aarnio, Alexy and Peczenik 1981 p. 138 note 15): One can always formulate a minimal rule $p \rightarrow q$; this rule yields no more than a trivial expression of the transformation $p \vdash q$. One may well ask whether $p \rightarrow q$ is a rule at all. But by applying a "like-clause", one can transform " $p \rightarrow q$ " into a very special but universal proposition " $(x) (\text{like } px \rightarrow \text{like } qx)$ ", cf. Hare 1954 p. 306 ff.; Hare 1963 p. 11. Such like-clauses are relevant in moral philosophy because they ensure that attention is paid to properties, not to individuals. Cf. section 4.1.3. infra.

- 4 Material inference rules: for example, from the "datum" that Petersen is a Swede, we obtain the conclusion that he is not a Roman Catholic. The applied inference rule is this: "A Swede can be taken almost certainly not to be a Roman Catholic". Cf. Toulmin 1958, especially pp. 98 and 109 ff.: warrants, inference licences. Cf. Nilstun 1979 pp. 35 ff.: material rules of inference. Nagel 1961 p. 138: material leading principles. Rosenberg 1974 pp. 74 ff.: material rules; cf. Uusitalo 1979 pp. 187 ff. Cf. Herménérén 1972 p. 31: "pragmatical implication".

- 5 Instead of



one can thus write a syllogism:

$$\begin{array}{l} p \\ p \rightarrow q \\ \hline q \end{array}$$

Cf. Nagel 1961 p. 138; cf. Stegmüller 1974 p. 98. At least one inference rule (most often a formal, logical one, not material) must, however, remain. Otherwise we would have no operation advice. (Ota Weinberger's remark.)

1.1.4.

- 1 Although I agree with Toulmin's criticism (1958 p. 248, cf. pp. 248-252) of "the desire to achieve analyticity even where it is out of the question", I do not share his "aversion towards formal logic" (cf. Nilstun 1979 p. 31). By the way, Toulmin seems to admit that formal logic is useful for "preliminary formalities of argument-stating" (Toulmin 1958 p. 173). I agree with Wisdom 1952 p. 195 that in "the courts of law the reasons are like the legs of a chair, not the links of a chain", see also Perelman 1958:2, but the "legs" are attached to the "chair" by many "chains", some deductive some not.

1.2.1.

- 1 I restrict the discussion to legal norms. The concept "the law" (and, still more, the concept "valid law") is more complex, since it is used with reference to three different kinds of phenomena complicatedly inter-related, i.e., human behaviour, mental processes and norms. These three kinds correspond to Popper's (cf. 1972 pp. 106 ff.) three worlds, and to three "planes" of the law, traditionally distinguished in Polish legal theory, cf. Lande 1959 pp. 913 ff. (written 1953/54) and a hint at pp. 149 ff. (written 1925). The fourth, axiological, plane is often added, and the planes are understood ontologically, epistemologically and/or methodologically, cf. Lang, Wróblewski and Zawadzki 1979 p. 31; cf. Opalek and Wróblewski 1969 pp. 328 ff.; Opalek 1969 pp. 983-995 and Wróblewski 1969 pp. 996-1006. Ziemiński 1980 p. 76 has reduced the planes to two aspects: formal and real. Similar views have been formulated in many traditions. Sethna 1962 p. X (cf. Laakso 1980 p. 306 note 122) has, e.g., pointed out that the law can be studied historically, philosophically, comparatively, analytically, sociologically and teleologically. On ontological problems cf. infra 1.4.4.1. and 3.3.6. note 4.
- 2 Cf. infra 1.4.4.1. on ontology and 3.2.1. item 4 and note 12 on contested concepts.

- 3 Cf. sec. 1.2.2. infra. Some theories of meaning are psychological but one can ask "if such an expression with which actually nobody's thoughts are being associated, can be said to constitute the reality of the norm. The question is to be answered in the affirmative... because in the case of associating thoughts with this expression these thoughts would be just of the particular (normative, directive) type." (Opařek 1970 p. 298.)
- 4 Cf. Castañeda 1975 pp. 179 ff.
- 5 See also, e.g., Sundby 1974 p. 17 and Raz 1977 p. 340. In J.L. Austin's terminology (cf. 1963 pp. 99-131) one can say that the "locutionary force" of a norm-creating performative speech act creates a norm-expressive statement (cf. below section 1.2.2.), whereas its "illocutionary force" - what is done in saying it - creates a norm. Paulson 1979 pp. 1 ff. and Woleński 1980 p. 105, compared conditions for success of a speech act with those for legal validity. Concerning the relationship of concepts "norm", "legal norm" and "valid legal norm" see below section 1.3.6.
- 6 For instance Kelsen 1960 p. 10; Raz 1977 p. 341.
- 7 Cf. Lang 1962 pp. 112 ff. and 128 ff., Olivecrona 1971 p. 112 and von Wright 1963 p. 196. See also Ofstad 1980 pp. 166-168: a norm is valid if it (a) ideally viewed, ought to be accepted, or (b) is generally accepted (consensus omnium), or (c) is acceptable, or (d) is supported by good reasons, etc. Luhmann 1973 p. 392 has emphasized that there are (es gibt) norms which are not valid.

1.2.2.

- 1 Cf. Hedenius 1963 p. 58. Ross 1958 pp. 9-10
- 2 Cf. Sundby 1974 pp. 174 ff. Lauridsen 1974 pp. 288 ff. Peczenik 1974 p. 205.
- 3 Cf. Aarnio in Aarnio, Alexy and Peczenik 1981 pp. 428 ff.
- 4 Peczenik 1963 passim; Peczenik 1969:2 pp. 9 ff. (= Peczenik 1968:3 pp. 117 ff.), 27 ff. (= Peczenik 1967 pp. 129 ff.), 60 ff. (= Peczenik 1969 pp. 46 ff.). Not only human action can be thus qualified, cf. ibid. and Olivecrona 1971 pp. 219 ff.
- 5 Opařek 1973 p. 222 and 1974 pp. 49 ff. Cf. Hare 1952 pp. 17 ff. (neustic). Cf. Ross 1968 pp. 69 ff.
- 6 Olivecrona 1942 pp. 25-26; Olivecrona 1971 pp. 128 ff.; Olivecrona 1976 pp. 132 ff. Cf. Harris 1979 p. 39: The idea that "(a)ll norms are the meanings of acts of will, that is their logical nature (...) is acceptable provided it is understood as relating only to the logical category into which norms fall, not to any assumptions about actual willings."

1.2.3.

- 1 Cf. Searle 1969 pp. 50 ff.: regulative, constitutive, organisatory. Cf. Rawls 1955.
- 2 Deontic-constitutive (deontisch-konstitutive) rules are necessary but not sufficient conditions of the institutional fact;thetic-constitutive (thetisch-constitutive) are sufficient but not necessary conditions; aletic-constitutive (aletisch-konstitutive) are both necessary and sufficient conditions, cf. Conte 1981 pp. 14 ff. and 1981:2 pp. 73 ff.

- 3 Cf. Strömberg 1980 pp. 80 ff. Eckhoff and Sundby 1976 pp. 87-88 extend the class of qualification-norms also to "ideal rules" such as "judicial decisions should be just", generally speaking to the Seinsollen ("the ought-to-be ought"), as opposed to Tunsollen ("the ought-to-do ought"). Cf. von Wright 1963 p. 14.
- 4 And further competence-norms say what a guardian "can" do.
- 5 Cf. Strömberg 1980 pp. 86 ff. Ross 1968 p. 130: "Competence is the legally established ability to create legal norms (or legal effects) through and in accordance with enunciations to this effect. Competence is a special case of power. Power exists when a person is able to bring about, through his acts, desired legal effects." Cf. Ross 1958 p. 166. On "power" cf. Hohfeld 1964 (1919) pp. 50 ff., and Moritz 1960 pp. 85 ff. Kanger and Kanger 1966 pp. 88 ff. reformulates "power" as: "p may see to it that F". (Cf. Kanger 1957, 1963 and 1972.) Lindahl 1977 p. 195 uses the formula: "p can^P bring about that F". (Can^PF = not unavoidable not F.) Sundby 1974 pp. 80 regards competence-norms as a sub-class of qualification-norms.
- 6 There are many views on what "complete" means. For instance, a complete norm is said to be conditional or not; involving pattern of behaviour or not; involving a sanction (or even a "complete" chain of sanctions) or not; etc., cf. Peczenik 1968:4 passim. See also Alchourrón and Bulygin 1971 p. 59.
- 7 Influenced by Hägerström's ontology (cf. infra 1.4.4.1.), Ross (1968 p. 118) wrote: "Norms of competence are logically reducible to norms of conduct in this way: norms of competence make it obligatory to act according to the norms of conduct which have been created according to the procedure laid down in them". Cf. Ross 1958 p. 32. Cf. Ziemiński 1970 p. 30: "it is possible to present the norms of competence as norms of conduct, but it is usually... inconvenient". Strömberg, however, (who accepts Hägerström's ontology but thinks that no norm fulfills its demands) criticises Ross, because validity of norms of conduct presupposes competence of the norm-giver, 1980 p. 89. Cf. Strömberg 1970 pp. 294 ff., 1969 pp. 191 ff. (re circular reference of legal norms to each other.) Cf. Lauridsen 1980 pp. 339-344 and 1981 pp. 110-114; Krarup 1981 pp. 82-84; Bjarup 1981 pp. 277-282. My solution is this: Validity of each norm presupposes another norm. A deep justification of propositions about validity must thus be infinite, circular or "spiral". Cf. sections 1.2.1. in fine, 1.4.1., 1.4.4.1. and 5.2.4. This spiral of legal experience exists entirely independently from the question whether one's starting point is the competence-norm "the lawgiver can make laws", or the norm of conduct "if the lawgiver did X then n ought to be observed". The epistemological question of the circular legal experience has nothing to do with the linguistic question of reducibility of competence-norms to norms of conduct.
- 8 Cf. Alexy 1979:2 pp. 63 ff. with extensive references.
- 9 Ibid. pp. 79 ff.
- 10 Cf. Dworkin 1977 p. 26: "A principle... states a reason that argues in one direction, but does not necessitate a particular decision." Cf. ibid. pp. 71-80. Cf. Sundby 1974 pp. 190 ff. re guiding standards (retningsslinjer, Richtlinien). The Scandinavian discussion: Eckhoff and Sundby 1976 pp. 128 ff.; Eckhoff 1976 pp. 205 ff. and 1980 pp. 145 ff.; Lauridsen 1978 pp. 123 ff.; Jareborg 1979 pp. 385 ff.; and 1981 pp. 436 ff. Sundby 1978 pp. 137 ff. See however Alexy 1979:2 pp. 78-79!

- 11 Consider, for instance, the following norm: "The tortfeasor should compensate the victim for the harm that resulted from a cumulation of the tortfeasor's action and the victim's illness". Had it been formulated in a statute, the norm would be a rule. Formulated in juristic literature (cf. Peczenik 1979 p. 267), or in another "should-source" or "may-source" of the law (see infra 2.2.2.), it works like a principle, that is, merely states a reason, useful in legal argumentation, but not directly deciding about a normative qualification. Is the classification of the sources of the law more important than the distinction between rules and principles?

1.2.4.

- 1 Cf. Dworkin 1977 p. 91; cf. p. 139; p. XI: "Individuals have rights when ... a collective goal is not a sufficient justification for denying them what they wish".
- 2 Dworkin 1977 p. 90 claims a stronger connection: "Principles are propositions that describe rights". This sounds like a stipulative definition, cf. MacCormick 1978 p. 259.
- 3 "Political rights are creatures of both history and morality: what an individual is entitled to have... depends upon both the practice and the justice of... political institutions", Dworkin 1977 p. 87.
- 4 Cf., e.g. Gewirth 1979. A version of this idea says that every human being has by nature a right to all that which is his own or his due (the suum), cf. infra section 1.4.2. notes 14 and 15. Troller (inter alia 1975 p. 17, 1980 p. 140 and 1980:2 p. 245) has pointed out that "to have" and "not to have" (Haben, Nichthaben), along with "to do" and "not to do" (Tun, Nichttun), are necessary elements of the mental picture of the law.
- 5 Cf. MacCormick 1978:2 p. 599 and 1976 pp. 305-317.
- 6 Concerning some ontological complications cf. Golding 1968 pp. 529 ff.
- 7 The classical Will Theory (a right is supremacy of will, cf., e.g. Windscheid 1906, I pp. 155 ff.) and Interest Theory (a right is interest protected by the law, Jhering 1888 vol. III:1 p. 339) had thus to meet counter-examples: most but not all instances of rights are covered by each theory, cf. Kelsen 1923 pp. 567-618, Opałek 1957 pp. 213 ff. and Peczenik 1966 p. 133 and 1969:3 p. 47 (= 1969:2 p. 148). This "jump" makes the concept of a right an essentially contested concept in the sense developed by Gallie 1965 pp. 167-168 and Dworkin 1977 p. 103.
- 8 Cf. Hare 1952 pp. 118ff., 148 ff.; Hare 1963 pp. 23 ff.; Alexy 1980 p. 190.
- 9 Ross 1958 pp. 170 ff.
- 10 See also Olivecrona 1939 pp. 75 ff.; 1971 pp. 182 ff. and 186 ff.; Ross 1958 p. 172; Ekelöf 1952 pp. 546-559; Peczenik 1974 p. 30; Schmidt 1978 p. 172.
- 11 Cf. Hägerström 1953 pp. 322 ff. and 1927 pp. 4 ff. Cf. Olivecrona 1959 pp. 127 ff.
- 12 Ibid.
- 13 Ota Weinberger's remark.

- 14 Strömberg 1980 pp. 112-113. Cf. Wedberg 1951 pp. 246 ff.
- 15 Cf. Eckhoff 1969 pp. 63 ff.
- 16 Aarnio's solution is to split up the concept of ownership: The seller's "ownership" is not the same as the buyer's "ownership", cf. Aarnio 1967. Hedenius's solution is what follows: If A has a factual disposition over the property, then there is a prima facie assumption that he is the owner; whoever says the opposite, has the burden of argumentation. (1975 pp. 37 ff.) See also Lantz 1977 pp. 29 ff.
- 17 Cf. a) supra.

1.2.5.

- 1 Cf., e.g., Kelsen 1923 p. VI and Winkler's (1979 pp. 183 ff.) criticism; Hudson 1979 passim; Weinberger 1975 pp. 30 ff., 1979:2 pp. 123 ff. and 1980 p. 334.
- 2 Cf., e.g., Searle 1964 pp. 120 ff.; Winkler 1979 p. 193; Gardies 1976 pp. 273 ff.
- 3 Cf. Castañeda 1973 pp. 69 ff. and 1975 p. 333 re "bridging implications".
- 4 Cf., e.g., Moritz 1963 p. 119 note 11, 1954 pp. 81-82, 1969 and 1972 passim; Kelsen 1979 p. 188; Walter 1980 pp. 299 ff.
- 5 Cf. von Wright 1963 p. 134.
- 6 Cf. Kanger 1957 (1971) p. 56; Aqvist 1973:2 p. 131; Rödiger 1972 pp. 171 ff.; Yoshino 1978:2 p. 148; Cf. infra sections 3.3.3. and 4.3.
- 7 Cf., e.g., Hare 1952 p. 25: "Now the word 'all' and other logical words are used in commands, as in statements. It follows that there must also be entailment-relations between commands; for otherwise it would be impossible to give any meaning to these words as used in them." Cf. Weinberger 1981 p. 120; Castañeda 1975 pp. 101 and 119.
- 8 In 1963, I suggested that a norm-expressive statement deductively entails another one, if and only if each state of affairs qualified in a given way by the second statement, is qualified in the same way by the first one, too. See Peczenik 1963. Cf. Peczenik 1969:2 pp. 11 (Peczenik 1968:3 p. 119), 31 (Peczenik 1967 p. 133) and 60 ff. (Peczenik 1969 pp. 46 ff.). See also Weinberger and Weinberger 1979 p. 127 (Weinberger and Weinberger 1979:2 p. 38): "Einem Sollsatz entspricht eine Menge von Pflichten. Aus den als Prämissen gesetzten Sollsätzen können genau jene Sollsätze als Folgerungen abgeleitet werden, die Untermengen der durch die Prämissen statuierten Pflichtenmenge ausdrücken." See also Woleński 1980 passim. Such a logic of norm-expressive statements, however, still differs from the logic of fact-descriptive statements. In the realm of fact-descriptive statements, only one kind of qualification is relevant for entailment: statements are qualified as true or false. In the realm of norm-expressive statements, on the other hand, one works with two kinds of qualification. One wants to know whether the relation between p and q is such that if p is qualified as valid, right, etc. then q is thus qualified; to know this, one must compare the states of affairs p qualifies as prescribed, permitted, prohibited etc. with the states of affairs q thus qualifies.

1.3.1.

- 1 Cf., e.g. Wedberg p. 257 - no reasonably exact definition of legal system can be formulated. Cf. Jørgensen 1970 Ch. 1. Cf. bibliography and classification of problems by Conte 1974 pp. 3-29.

- 2 Cf. Peczenik 1966 pp. 13 ff. on "regulative comparative methodology".
- 3 "Ordinarily" refers either to ordinary language or to its specialized branch - legal terminology. Consequently, our interpretation of the concepts "law" and "valid law" will be better adapted to juristic discourse than, for instance, to empirical sociology.
- 4 Cf. Peczenik 1972 pp. 239 ff.
- 5 Cf. ibid.
- 6 See also Raz 1982 pp. 107-111 and 124: "an evaluative judgment about the relative importance of various features" of law. Cf. 5.1.3.2. note 6 infra.

1.3.2.

- 1 Cf. Wedberg 1951 p. 254.
- 2 On language games in the law cf. Aarnio 1977 pp. 47-49, 126-128, 228-229, 296-298, 300, etc. On thought-lines cf. Peczenik 1979:2, pp. 50-51 (= 1979:3 p. 167) re "thought-lines", and Schmidt 1980 pp. 549 ff. re "thought-ways" ("tankevägar").

1.3.3.

- 1 On procedural theories cf. Alexy 1981 pp. 177 ff. Cf. Peczenik 1977 pp. 112 ff., especially 120 and 1979 pp. 6 ff. on step-by-step method.
- 2 Cf. Nowak and Ziemiński 1979 pp. 122-123 on "initial condition" and "induction condition" of legal validity.
- 3 Cf. Aarnio, Alexy and Peczenik 1981 p. 142 note 22. This distinction is an idealisation: one can interpret many types of legal reasoning both as transformations inside the law and as transformations into the law.
- 4 Presupposition is either a kind of logical consequence (cf. Strawson 1952 p. 175 - "S' is a necessary condition of the truth or falsity of S" - and Stegmüller 1976 p. 55) or at least such a consequence in view of a transformation rule accepted as necessary by the philosopher who performs the analysis. Cf. Kant 1781(7) B87/A62 etc. and section 3.2.1. infra.

1.3.4.

- 1 Cf. Lang 1962 pp. 112 ff. and 128 ff. Cf. Marantz 1979.
- 2 Ilmar Tammelo suggested the term "category-transmutation". Cf. Castañeda 1975 p. 245: "Thus, deontic propositions have truth-values that depend ultimately on nothing but non-deontic empirical propositions and non-deontic implications. Yet the truth of a deontic judgment that is true but not logically true is in general non-inferable from a set of true non-deontic propositions."
- 3 There is only one transformation into the law; category-transformation and criteria-transformation are, as it were, within it - they are its two sides, whose distinction is merely an analytical tool. Even Legal Realists, who say (in the meta-language and from an external point of view) that there is no "legal ought" and that valid law is nothing but what people call "valid law" (cf. Strömberg 1980 pp. 37 and 39 ff.) must perform the criteria-transformation (that is, they must take the non-deductive step from incomplete criteria of law to final

identification of the law), or they must conclude that the concept "(valid) law" in the object language (as opposed to the meta-language) is problematic, cf. Olivecrona 1971 pp. 112-113.

4 Cf. Peczenik 1981 pp. 284 ff.

5 Cf. McCormick 1978 p. 138. Cf. also section 1.4.9. infra.

6 Schreiber's "ideal" validity, Wróblewski's "axiological" validity, Zippelius's and Dreier's "moral" validity, Ott's "binding force" (Verbindlichkeit) etc. are close to the question of justification. Schreiber's "constitutional", Wróblewski's "systematic", Ott's "normative", Dreier's "juristic" validity; Zippelius's "socially ethical" and "legal" (related to force) validity; Schreiber's, Wróblewski's and Ott's "factual" validity, Dreier's "sociological" validity, Hart's "rule of recognition", etc. are concentrated around the question of identification of the law. Cf. Dreier 1981 pp. 194 ff.; Hart 1961 pp. 97 ff., Ott 1976 pp. 21-23, Schreiber 1966 pp. 58 ff., Wróblewski 1972 pp. 241 ff. and Zippelius 1973 pp. 32 ff. But the justification ("ideal", "moral", "axiological") of legal validity from the legal point of view poses some specific problems unknown to moral theory in general, cf. section 1.4.10. infra.

1.3.5.

1 Cf. Kelsen, inter alia 1960 pp. 228 ff., and section 2.2.3. infra.

2 Cf. Kelsen 1960 pp. 34 ff.; Bobbio 1965 pp. 321 ff.; Hedenius 1963 pp. 78-79 (legal validity as regularities in the action of the authorities). Some limitations: First, force is actual only at the end of a long normative chain: when N_1 is violated then N_2 is applicable, when N_2 is violated then N_3 is applicable, etc.; when N_n is violated, then N_n says that force should be used. (Cf. Grzybowski^m 1961 p. 28) on infinite chain of such relations.) Second, "force" might consist of mild criticism only, e.g. applied by Swedish Justice Ombudsman, Consumer Ombudsman, Radio Council, Council of Complaints etc. Third, qualification-norms and competence-norms (section 1.2.3. supra) are related to force in a more complex manner, cf. Strömberg 1980 pp. 80 ff., 86 ff. and 155 ff. and Olivecrona 1976 pp. 276 ff. Cf. Tebaldeschi 1979 pp. 105 ff. on efficacy.

3 Cf. Dias 1968 p. 253.

4 From Kelsen's point of view, there is no difference between the exercise of power by courts and tax authorities and the exercise of power by gangsters, except that the Grundnorm is presupposed in the first case, not in the second. Cf., e.g., Kelsen 1963 p. 1452. In my opinion, the situation is more complex, see below. Cf. Stone 1964 p. 127 ff.

5 Cf. Peczenik 1974 pp. 44 ff. and 1972 pp. 216 ff.

6 This model directly applies only to modern law, except international law (cf. Gihl 1957 pp. 51 ff. and Ross 1958 pp. 60) but can be completed with a set of exceptions, reporting how reality deviates from the model.

7 Cf. Eyben 1969 p. 111.

8 Cf. Olivecrona 1939 pp. 171 ff. and 1940 pp. 43 ff. and 1971 pp. 271 ff.

9 Hector-Neri Castañeda's expression. And: "rules of law regulate... the conditions under which a private individual... may perform juridical acts which... count as making a contract or sale or purchase or conveyance or bequest, contracting a marriage, constituting a trust, incorporating a company, issuing a summons, entering judgment ..." (Finnis 1980 p. 268-269.)

- 10 Cf. Raz 1979 p. 118.
- 11 Cf. Ross 1958 p. 34. Cf. Rottleuthner 1981 p. 170.
- 12 Cf. Raz 1979 p. 119.
- 13 Cf. *ibid.*
- 14 Cf. Peczenik 1968:2 pp. 260 ff. = 1969:2 pp. 94 ff.; Strömholm 1969:2 p. 194; Dyekjaer-Hansen 1971 pp. 261 ff.; Anscombe 1978 p. 30; Rottleuthner 1981 p. 170.
- 15 Cf. Ross 1946 pp. 89-90 and Olivecrona 1971 pp. 70-71.
- 16 Ross 1958 p. 62.
- 17 Cf. Raz 1979 p. 115 and 1970 pp. 105 ff and 191 ff. on "primary legal institution".
- 18 Cf. Kelsen 1960 pp. 34ff., Olivecrona 1939 pp. 171 ff. and Ross 1958 p. 62. Cf. Bobbio 1969 pp. 189 ff.
- 19 Cf. V. Black 1980. Cf. Finnis 1980 p. 268: "definition, specificity, clarity and thus predictability". Cf. Rottleuthner 1981 p. 170.
- 20 Cf. V. Black 1980.
- 21 Cf. section 1.4.4.1. note 6 *infra*.
- 22 Cf. Strömholm 1981 pp. 37 ff.
- 23 In my opinion, evaluative operations are necessary not only in order to help an individual to create his personal super-system of legal, moral and other evaluative opinions (*Zusammenschlussystem*, Weinberger 1971, pp. 399 ff., 423 ff. etc.) but also to obtain knowledge of at least one of the component-systems, that is, of the legal system, cf. sections 1.4.7., 3.3.1. and 7.1.1. *infra*. But Kriele's requirement (1979, esp. p. 117, see also Dreier 1981:2), "im grossen und ganzen ethisch gerechtfertigt", seems to be too strong. Cf. Lucas 1980 p. 123: "In the Middle Ages it was said *lex iniusta non est lex*. That gives bad laws too short a shrift... We must therefore say... that *lex iniustissima non est lex*." Cf. Finnis 1980 pp. 364-365: "The central tradition of natural law... has affirmed that unjust LAWS are not law. ... *Lex iniusta non est lex* ... implies (i) that some normative meaning-content has for some community the status ... of law, (ii) that that law is unjust..., and (iii) that compliance with that law is... not justified".
- 24 Alexy in Aarnio, Alexy and Peczenik 1981 p. 144. Cf. section 2.3.8. *infra*, note 2, about the reasons for "elimination".
- 25 Hence there are many language-games, cf. section 1.3.2. note 2 *supra*.
- 26 This inference is another ("second-degree") social fact.
- 27 Raz 1970 p. 105 identified the law in reference to basic legislative power. But we need the criteria-transformation in order to identify this "power".
- 28 Ronald Dworkin's expression.
- 29 Cf. Hart 1961 pp. 144 ff. on "uncertainty in the rule of recognition". Cf. McCormick 1978 pp. 138 ff.
- 30 Cf. *ibid.* pp. 62-65, 138-140, 240-241 and 275-292.
- 31 International law can help one to establish the law-character (and validity, cf. section 1.4.6. *infra* note 2 in fine) of a national normative system. But: 1) the step from international law to national law often requires a transformation; 2) establishment of the law-character of inter-

national law can also require a transformation; 3) law-character of international law is partly based on the law-character of national laws of states which (via treaties etc.) create international law.

32 Cf. Dias 1970 pp. 75 ff. and 1976 pp. 684 ff.

1.3.6.

1 Cf. section 1.3.4. supra.

2 Cf. section 1.4.10 infra.

3 An interpretation of the concept of "law" is also possible (although somewhat strange), in which draft statutes, foreign statutes, or norms of private organizations are "law", but one cannot say that they are "valid law".

4 Castañeda 1974 p. 156 (cf. 1975 pp. 3-4) has written that "in explicit references to the moral character of an act, the deontic terms will be accompanied by the adjective 'moral' ... or the adverb 'morally' (e.g. 'Jones ought morally to do A'...)." One can thus write "^M!-ly_p" and "^L!-ly_p", instead of "^M!-p" and "^L!-p", but one must remember that the adverbs "M-ly" and "L-ly" have the "ought-component" ("validity-component").

1.4.1.

1 Cf. section 2.2.3. infra.

1.4.2.

1 Cf. Verdross 1950 pp. 509 ff.; Mautner 1979; Finnis 1980 pp. 364 ff.

2 Mautner 1979 quoting Thomasius.

3 For instance Verdross 1971. Cf. Peczenik 1971:4, 1971:5, and 1974 pp. 35-36.

4 Cf. Stone 1965 p. 41. Strömberg 1981 pp. 11-12.

5 Cf. Stone 1965 pp. 49-50.

6 Cf. Stone 1965 p. 51; Dias 1976 pp. 655 ff.

7 Cf. Olivecrona 1971 pp. 275 ff., 1973 pp. 197 ff. and 1975 pp. 109 ff.

8 Cf. Kant 1797:2 passim.

9 Cf. Fuller 1969 pp. 95 ff.

10 Cf. Finnis 1980, e.g. p. 289: "In sum: the derivation of law from the basic principles of practical reasoning has...two principal modes... The central principle of the law of murder, of theft, of marriage, of contract... may be a straightforward application of universally valid requirements of reasonableness... (The) second mode, the sheer determination by more or less free authoritative choice, is itself not only linked with the basic principles by intelligible relationship to goals ... which are directly related to basic human goods, but also is controlled by... structuring principles... which themselves are derived from the basic principles by the first mode of derivation." Cf. Bassave 1977 p. 97: "Natural law is a set of rules intrinsically valid, rationally cognizable by human beings and congruent with human nature."

11 Cf. Olivecrona 1977 pp. 79 ff.

- 12 Cf. Stone 1965 p. 41 and Strömberg 1981 pp. 11-12.
- 13 Cf. Villey 1975; Rapp 1979 pp. 418 ff. See also section 6.2. infra.
- 14 Olivecrona 1969 pp. 176 ff., 1971 pp. 275 ff., 1973 pp. 197 ff. and 1977 pp. 81 ff. Cf. Mautner 1979.
- 15 Olivecrona ibid. Mautner ibid. Olivecrona 1975 pp. 109 ff. See also Waldstein 1980 pp. 286 ff., 310 ff.
- 16 Cf. note 14 supra.
- 17 Cf. Strömberg 1981 p. 15.
- 18 Cf. Tatarkiewicz 1970 vol. I p. 58.
- 19 Cf. Stone 1975 p. 75 note 238.
- 20 Cf. Strömberg 1981 pp. 15-16.
- 21 Cf. Olivecrona, quoted above.
- 22 See below section 6.2.
- 23 E.g., Stammler's, cf. 1902.
- 24 Cf. section 5.2.6. infra.

1.4.3.

- 1 Raz has written that there is no general moral obligation to obey the law (1979 p. 260). Similarly enough, Lyons denies that there is a valid principle of justice which requires adherence to law by officials (1973 pp. 833-861, cf. 1971 pp. 118-119).
- 2 Cf. Tatarkiewicz 1970 vol. I p. 58. Dias 1976 p. 79.
- 3 D 1,4,1 pr. Nörr 1974 pp. 20, 24, 120, counts with a clear legal positivism already in antiquity.
- 4 Hobbes 1651, II, 26, 8. Cf. Olivecrona 1971 p. 19.
- 5 Austin 1832, Bentham 1970. Cf. Olivecrona 1971 pp. 27 ff and Ott 1976 pp. 34 ff.
- 6 Cf. Bergbohm 1892 p. 40 and pp. 542 ff. Cf. Olivecrona 1971 pp. 39 ff. and Ott 1976 pp. 41 ff. Already for Savigny (1840, §§ 4 ff.; cf. Olivecrona 1971 pp. 37 ff.) the state was corporeal form (Gestalt) of the law-determining spirit of the people (Volksgeist). Cf. Savigny 1814.
- 7 Bergbohm 1892 p. 542 ff. Cf. Olivecrona 1971 pp. 39-40.
- 8 Bierling 1894 (cf. vol. 1 pp. 27, 30, 107-113) has, however, developed a doctrine similar to Bentham's, cf. Cornides 1976 p. 209.
- 9 Olivecrona 1971 pp. 71 ff. and 73 ff.
- 10 Olivecrona 1971 pp. 65 ff. Bentham has himself noticed the circle, cf. 1970 p. 279, cf. Olivecrona 1978 p. 237 n. 14.
- 11 Cf. Hart 1961 pp. 77 ff.
- 12 Hart 1961 pp. 102 ff.; 1964 pp. 307 ff. Tammelo 1948, influenced by early works of Alf Ross, has expressed a similar idea. Another idea is that the constitution ought to be observed from the legal point of view because legal norms of lower standing presuppose that it ought to be observed (a "normative feed-back"), cf. Eckhoff and Sundby 1975 p. 143 and 1976 pp. 13-14 and 218-220; cf. Eckhoff 1976:2 pp. 68 ff. Cf. infra sections 3.3.4. and 5.2.4. on "reflective equilibrium" and "spiral of legal experience" that, however, involve not only positive law but also social and individually-autonomous morality.

- 13 Cf. Hart 1961 pp. 195 ff.
- 14 Ibid. p. 206. Cf. McCormick 1981 pp. 20 ff. and 158 ff.
- 15 McCormick 1981 p. 161.
- 16 Cf. sections 1.4.10., 5.2.2. and 5.2.4. infra.
- 17 Cf., however, sections 1.4.10. and 5.2.2. infra. Raz 1979 justifies his positivistic views by reference to the necessity of division of labour between the legislator and the judiciary.

1.4.4.1.

- 1 Cf., e.g., Petrażycki's theory, 1959; 1959/60; 1968; 1925; 1895; cf. Görecki 1975 passim and Peczenik 1975:2, 83-86. Cf. Summers 1981 passim on American Realism. Cf. Jørgensen 1977:2 pp. 95 ff. (Jørgensen 1978 pp. 29 ff.) on "idealism and realism in jurisprudence".
- 2 Cf. Hägerström 1929 p. 116. Cf. Bjarup 1978 p. 25 and Vogel 1972 pp. 21 ff. Hägerström rejected Kant's distinction between the thing in itself (Ding an sich) and the thing as it appears to us (Anschauung), cf. ibid. pp. 114 ff. and Hägerström 1908 pp. 73 ff. See below section 4.5. Metaphysics in general consists of mere strings of words, about whose character the metaphysicians know nothing, Hägerström 1929 p. 136. The conclusion: Praeterea censeo metaphysicam esse delendam, Hägerström 1929 pp. 111 and 158. And: "materialism is actually the only possible world-view", Hägerström 1964 p. 299, cf. Bjarup 1980 p. 153. Metaphysical statements are meaningless because they are self-contradictory, cf. Bjarup ibid., and "the law of contradiction declares, in fact, what reality in itself is", Hägerström 1964 p. 42; cf. Bjarup 1980 p. 152.
- 3 Cf. Marc-Wogau 1940 p. 289, cf. 1968 p. 113.
- 4 Cf. Hägerström 1929 pp. 132 ff. and Bjarup 1978 pp. 42 ff.
- 5 Cf. Quine 1969 pp. 53 ff.
- 6 Cf. especially Anscombe 1958 pp. 69 ff., Searle 1969 pp. 50 ff., McCormick 1974 passim and 1978 p. 57, Weinberger 1979:3 pp. 173 ff. and 1980:2 pp. 427 ff.
- 7 The uncontroversial part of reality has both the time dimension and the space dimension: moreover it can be to some extent approached by our senses. Each "jump" (see section 1.1.2. supra) removes us further and further away from this uncontroversial part of reality. When the "jumps" are too many and too "long", we leave reality and construct fictions. Cf. section 5.1.8. infra re incoherence of presuppositions about reality.
- 8 Cf. Olivecrona 1959 p. 149 and 1971 pp. 197 and 259-267, criticized by Röss 1967 pp. 298 ff. and Sundby 1968 pp. 98 ff.
- 9 Concerning rights, cf. Olivecrona 1971 pp. 186 ff.
- 10 Strömberg 1980 pp. 80 ff. and 86 ff.
- 11 According to Strömberg 1980, "metaphysical propositions", e.g. ought-propositions, have no truth-value "according to the Uppsala-school" (pp. 22-23) and "according to methods the author (=Strömberg) wishes to recognize as scientific" (p. 26), but Strömberg is not "absolutely against" value-objectivism in ethics (p. 26).
- 12 Cf. Llewellyn 1960 p. 4: "A right man cannot be a man and feel himself a trickster or a charlatan."

1.4.4.2.

- 1 Cf. Peczenik 1974 pp. 36-39. Cf. Summers 1981 pp. 904 ff.
- 2 Ross 1958 p. 44. Cf. a simpler theory by Holmes 1897 p. 461.
- 3 Strahl 1970 p. 109.
- 4 Cf. Summers 1981 p. 905.
- 5 Cf. Ross 1958 pp. 37-38 and 48-49.
- 6 Cf. Allen 1958 pp. 463 ff. Cf. Makkonen 1965 p. 65.
- 7 Some such stipulations: "a rule can be valid law to a greater or lesser degree", Ross 1958 p. 45. When predictions are unsure, the person applying the law in fact creates the new law, cf., e.g., Eyben 1969 p. 111. Regularities in human action constitute the "basis of reality" for valid law, cf. Hedenius 1963 pp. 75 ff. Cf. also Ahlander 1950 p. 69: statutory rules need not be "legal" rules. Statutes are mere arguments for judicial discussion, legal rules are the final result of the judge's consideration of the issue, cf. Bolding 1968 pp. 14, 19 and 25, cf. 1969 pp. 59 ff.
- 8 Lauridsen 1974, inter alia pp. 143 ff., 148 ff., 153 ff., and 181 ff., has criticised Ross' predictionism for its connection with the correspondence theory of truth.

1.4.5.

- 1 Cf. section 3.2.1. item 4 infra. "Law" is a contested concept, cf. Galie 1965 pp. 167-168.

1.4.6.

- 1 The term "apex norm" has been used by Stone 1964 p. 109.
- 2 Cf. Kelsen 1967 pp. 200-201 (transl. of 1960 pp. 203-204): the Grundnorm "must be formulated as follows: Coercive acts ought to be performed under the conditions and in the manner which the historically first constitution, and the norms created according to it, prescribe. (In short: One ought to behave as the constitution prescribes.)" This is a norm imposing a duty. Raz 1974 p. 97 has, however, written that the "nature" of the Grundnorm is power-conferring. Cf. Paulson 1980 p. 177: the Grundnorm is a rule that authorized the "founding fathers" to draft and ratify the constitution. Cf. Kelsen 1960 pp. 51 ff. and 1958 p. 1400. Some degree of efficacy of the legal system as a whole is a necessary but not sufficient condition of presupposing the Grundnorm, cf. Kelsen 1960 pp. 215 ff.
As an alternative, Kelsen admits a construction in which legal validity is based on international law whose Grundnorm is what follows: "Die Staaten... sollen sich... so verhalten... wie es einer gegebenen Staaten-gewohnheit entspricht." (Kelsen 1960 p. 222.) Cf. 1.3.5. supra, note 31.
- 3 Cf. section 1.4.10. infra.
- 4 Marantz 1979 p. 5.
- 5 Kelsen 1928 p. 339. Cf. Kelsen 1951 p. 1391; 1958 pp. 1397 ff.; 1960:2 pp. 1422 ff.; 1960 pp. 204 ff.; 1961 p. 827. Who presupposes the apex norm, legal scholars only or also practical lawyers? - cf. Stone 1964 p. 124. Kelsen 1945 p. 116: The Grundnorm is "the necessary presupposition of any positivistic interpretation of the legal material"; my italics.

Cf. Kelsen 1960 p. 209. But see Walter 1968 p. 339: "Es wurde bereits betont, dass die Reine Rechtslehre eine Theorie der Rechtsdogmatik, nicht der Rechtsgeschichte oder der Rechtspolitik ist."

On relations of the Grundnorm to principles of law and to international law cf. Stone 1964 pp. 108 ff.; Dias 1976 pp. 488 ff.

- 6 Ontological problems concerning the apex norm are difficult cf. Peczenik 1981 p. 294. One can say that the apex norm exists in the legal practice which presupposes it (Hector-Neri Castaneda's point), cf. section 1.2.1. supra, items 4 and 5. Cf., however, Tebaldeschi 1979 p. 125: "Morphologisch ist also die Grundnorm keine Entität. Sie ist per definitionem unformuliert und unformulierbar."

Hart 1961 pp. 97 ff. and 245 ff. replaced the Grundnorm with the "rule of recognition", cf. sections 1.4.3. supra and 5.2.2. infra, Harris 1979 pp. 70 ff. replaced it with the "basic legal science fiat". Strömberg 1980 p. 89 pointed out that legal system presupposes at least one competence rule, authorizing the norm-giver.

- 7 Kelsen 1934 pp. 66 ff.: "Die Reine Rechtslehre operiert mit dieser Grundnorm als einer hypothetischen Grundlage. Unter der Voraussetzung, dass sie gilt, gilt auch die Rechtsordnung, die auf ihr beruht."
- 8 The Grundnorm 1 is, however, not an empirically falsifiable hypothesis about the relationship between the law and such social norms as pre-constitutional customary law (cf. Lachmayer 1977 p. 207), social morality or natural law (Marcic 1963 pp. 69 ff.). An ordinary lawyer would presuppose the apex norm "the constitution ought to be observed" even if there were no social norms but the law.

Cf. Verdross 1930 p. 1308 und Walter 1968 p. 339. Besides: "It is sometimes the case that two alternative scientific hypotheses may be equally apt to explain the phenomena in question. But there is no room for alternative Grundnormen, which may serve as postulates of a given legal system." - Dias 1976 pp. 499-500. Cf. Hägerström 1953 p. 277: The apex norm "merely hovers in the air. It does not exist in the soul of any individual man, nor does it exist by means of a certain proposition referable to an authority."

Cf. sections 1.4.7. and 1.4.9. infra.

- 9 Cf. Kelsen 1964 p. 1977; Kelsen 1979 pp. 206-207; cf. also Olivecrona 1971 p. 114. Concerning Olivecrona's views about the law and the act of will cf. ibid. pp. 73 ff., 268 ff. Cf. Vathinger 1922 p. 24 on fictions.

1.4.7.

- 1 Cf. Peczenik 1981 pp. 287 ff. The idea that this rule should be called "Grundnorm" is Robert Alexy's, cf. Aarnio, Alexy and Peczenik 1981 pp. 143 ff.
- 2 Cf. section 1.4.10. infra.
- 3 Ordinary lawyers do not think about the Grundnorm 2 but they say things which would be more coherent had they thought about it. Cf. Peczenik 1966 pp. 138 ff. Cf. section 4.1.4.2. infra re coherence.

1.4.8.

- 1 Cf. Alchourrón and Bulygin 1971 p. 73 and note 2. Cf. Tebaldeschi 1979, pp. 116 ff. and p. 152-3 note 51.

- 2 Raz 1974 pp. 110-111: "though Kelsen rejects natural law theories, he consistently uses the natural law concept of normativity, i.e., the concept of justified normativity." Cf. Olivecrona 1971 p. 45 ff. about Legal Positivism in general.
- 3 It seems that Grundnorm 1^J fits Kant's theory of practical reason (cf. Kant 1797, Anmerkung A after § 49), whereas Grundnorm 1^A fits his theory of pure theoretical reason. Cf. Dreier 1981:2 and 1979 pp. 89 ff.

1.4.9.

- 1 The Grundnorm 2^J is thus a bridging implication (cf. Castañeda 1973 pp. 69 ff. and 1975 p. 333.). Castañeda has pointed out that the step from the non-legal "ought" to the legal "ought" is required by the unity of practical discourse, cf. 1975 p. 333.
- 2 Esser 1964:2 pp. 52 ff. has written that a judge transforms moral principles to legal principles. Kelsen 1979 p. 97 answered that the correspondence of moral principles and legal decisions is irrelevant to the validity of the decisions. In my opinion, it is irrelevant in some cases of contextually sufficient justification of legal validity, but relevant in other cases, and always relevant in deep justification.
- 3 MacCormick 1978 pp. 62-65, 138-140, 240-249 and 275-292. It was Robert Alexy's idea to use MacCormick's theory in this context.
- 4 Cf. sections 2.2. (passim) and 5.2.2. infra. Sundberg 1978 pp. 27 ff. wrote that the doctrine of the sources of the law has character of customary law. This interesting theory obscures, however, the difference between the doctrine of legal sources, justifying the constitution, and (other) customary law, justified by it. See also note 5 infra.
- 5 Lachmayer himself regards the "präkonstitutionelles Recht als oberste Rechtsquellenschichte" (1981 p. 269), not as a part of legal ideology. Cf. 1977 p. 207 and 1977:2 pp. 411 ff. But see note 4 supra.
- 6 Cf. section 1.3.5. supra.
- 7 One can perhaps understand the Kelsenian Grundnorm ("the constitution ought to be observed from the legal point of view") not only as a pre-supposition but also as a testable hypothesis which one can refute as non-justified if the required combination of facts and values, indicated by the Grundnorm 2^J, is not present.
Nino 1978 p. 374 holds that Kelsen's Grundnorm is a working hypothesis that the law is justified.

1.4.10.

- 1 Cf. Alexy 1981 p. 186 on "Notwendigkeit des Rechts". Cf. Alexy in Aarnio, ATexy and Peczenik 1981 pp. 273 ff. One can associate these ideas with Hobbes 1651, cf., e.g. II, 17, and II, 26. This moral justification of law contains also a Kantian element of universalizability: if everybody would autonomously, without the law, judge all social conflicts, then immoral chaos would occur. Cf. section 4.1.3. infra. Why would chaos occur? Because the decision-situation would be too complex for an individual. The main function of the law is to create authority reasons that reduce this "subjective complexity", cf. Luhmann 1972 vol. 1 pp. 190 ff. and vol. 2 pp. 207 ff.
- 2 Moral precepts thus "follow from an ideal notion which laws are expected to approximate, at least for the most part" (Rawls 1973 p. 236, cf. Siitonen 1979 pp. 355-356.) Radbruch 1950 p. 127 has written that "Recht die Wirklichkeit sei, die den Sinn hat, der Gerechtigkeit zu dienen."

- 3 Aulis Aarnio and Hector-Neri Castañeda expressed this thesis in a discussion about the present work.
- 4 This term has been used by Samek and Raz, cf. especially Samek 1974 pp. 86-87 and 337, and Raz 1977 pp. 346 ff. My concept "the legal point of view", related to morality in the above-discussed way, is, however, stronger than Raz's. Cf. Raz 1977 p. 352: (some) "...statements of legal rights and duties... are detached, that is they do not assert the existence of such rights or duties but only their existence from the legal point of view." Cf. p. 346: "A detached legal statement... does not carry the full normative force of an ordinary normative statement... I am not implying that lawyers...do not believe in the validity (i.e. justification) of the law with which they deal. Only that often they do not commit themselves to such beliefs when acting in their professional capacity." Cf. Raz 1974 p. 111 (Peczenik 1981 p. 286 n. 26 and Aarnio, Alexy and Peczenik 1981 p. 143 n. 27 disregarded this difference.)
- 5 Whoever says that the law ought not to be observed from the moral point of view, has the burden of argumentation. Cf. Paulson's (1979 pp. 1 ff., 14 ff.) "alternative schema of validity": "Rather than requiring that all conditions be (positively) satisfied, the schema requires only that a given condition not be shown not to have been satisfied." (p. 19, summary). Cf. Alexy 1978 pp. 242 ff. on the burden of argumentation in general.
- 6 Assume that contextually sufficient legal justification supports the conclusion that, from the legal point of view, the judge should do X, whereas prima facie moral justification support the opposite conclusion: from the moral point of view, he ought to do non-X. Deep justification is necessary to solve the conflict of duties. It may lead to the conclusion: as a judge, do X! (and, if you are no judge, do non-X!). Contextually sufficient justification assumes a (legal, moral, etc.) point of view, deep justification is not relative to the point of view.

1.4.11.

- 1 Aulis Aarnio and Ota Weinberger expressed this thesis in a discussion about the present work.
- 2 See, however, sections 2.3.10.7. and 7.3.4. note 8 on the principle lex superior.

1.4.12.

- 1 On "legal order" and "legal system", cf., inter alia, Alchourrón and Bulygin 1971 pp. 4-5, 74, 77 and 88 ff.; Stone 1964, especially Ch. 1, pp. 21 ff.; Eckhoff and Sundby 1976 pp. 47 ff. and 244 ff.
- 2 Kelsen's and Austin's criterion, formulated and criticized by Raz 1970 p. 105.
- 3 Cf. Kelsen 1960 p. 317.
- 4 Cf. also Raz 1974 p. 99.
- 5 Cf. Raz 1970 p. 192.
- 6 Cf. Strömberg 1980 pp. 39 ff.
- 7 Cf. Eckhoff and Sundby 1976 pp. 231 ff. Besides, Luhmann 1976 p. 133 has pointed out that "Die Grenzen des Rechtssystems müssen... nicht als eindeutige Linien gedacht werden, ... sondern als Zonen erhöhter Zitierwahrscheinlichkeit."

- 8 An additional problem. A Swedish court might be under duty to apply, for instance, Italian law, when adjudicating a divorce case between Italian citizens, etc., etc. Are the Italian norms valid in Sweden? Are they a part of the Swedish legal order? Raz 1977 p. 342 has written that "validity according to law is broader than membership of the legal system".
- 9 Ota Weinberger formulated this conclusion in a discussion about the present work.

1.5.

- 1 Cf. sections 1.3.3. note 4 supra and 3.2.1. infra.

2.1.

- 1 This section corresponds to sections I.5.1. and I.5.2. of Aarnio, Alexy and Peczenik 1981, pp. 149-150.
- 2 Cf. Engisch 1963 p. 5: konkretes juristisches Sollensurteil.

2.2.1.1.

- 1 Summers (1978 pp. 707 ff.) has elaborated the following classification: substantive reasons, authority reasons, factual reasons, interpretational reasons and critical reasons. Because this book is concerned with "questions of law", not "questions of fact", I disregard factual reasons. Critical reasons are merely authority reasons or substantive reasons used to criticize others of their kind (pp. 726 ff.). Similarly, interpretative reasons, which support a given interpretation of the law, are of either substance or authority (p. 726). Cf. Schmidt 1972 pp. 569 ff.: open and bound arguments.
- 2 Cf. Summers 1978 p. 716.
- 3 Cf. ibid. p. 717.
- 4 Cf. ibid. p. 718.
- 5 Cf. MacCormick 1978 pp. 105-106, 108-119, 128, 129-151, etc. Cf. Wasserström 1961 passim, p. 7 ("the justice of a legal rule... rather than the justice of the particular decision, is the sufficient condition for a particular decision"), and p. 155 ("it requires the court... to formulate a hypothesis... with respect to the consequences to society of this rule"). Cf. MacCormick 1978 p. 116: "This is, in short, a rule-utilitarian justification procedure".
- 6 Cf. 3.3.4. infra on reflective equilibrium.
- 7 Cf., e.g., Rottleuthner 1980 passim and 1981 p. 211; Koch and Rüssmann 1982 pp. 227 ff. Cf. section 2.3.9.4. infra.
- 8 Sundberg 1978 pp. 24 ff. bases it on authority of some persons: authority of the legislator thus justifies authority of statutes; similar relations exist between legislative committees etc. and legislative preparatory materials, between judges and precedents, between the people and customary law, and between legal scholars and legal literature ("doctrine"). In my opinion, authority of these persons is relevant for causal explanation and deep justification of the sources, but in contextually sufficient justification, the latter are independent of the former, cf. Olivecrona 1971 pp. 128 ff. on "independent imperatives".

Cf. Fuller on justification of various forms of the law: custom (1968 pp. 63-75 and 101-120; 1969:2 pp. 1 ff.); contract (1969:2 pp. 13-20); legislative law (1969:2 pp. 20-26 and 1969 Chs. 2 and 5); administrative and managerial directives (1969:2 p. 24); adjudication (1978 *passim* and 1968 pp. 121-158). Cf. Summers 1978:2 pp. 444-445.

2.2.1.2.

- 1 Re some other senses of the term "the source of the law", cf. Ross 1929 p. 291 and Raz 1977 p. 344.
- 2 The sources of the law are "the input law", to be contrasted with "the output law", resulting from further transformations, cf. section 2.3. *infra passim*.

2.2.1.3.

- 1 Cf. Bogdan 1978 pp. 91-92 on praesumptio similitudinis between legal orders.
- 2 Cf. Peczenik 1974 pp. 48 ff. and 1975 pp. 7 ff. (Cf. Hughes 1968 p. 430: "Does (the argument from injustice) stand on any different footing from the argument that a court should adopt a certain interpretation because there are earlier authoritative decisions which hold that way? It would not suffice to say that the latter is a legal argument because courts must be persuaded by it while the argument from injustice is only one that they may listen to, for courts have frequently brushed aside precedent and declared openly that for reasons of justice they will create a new rule." Hughes thus refutes the traditional hierarchy of legal sources, whereas in my opinion, this hierarchy has a prima facie character.
- 3 As a description, it is too "tidy" (Robert Summers's expression), cf. Simpson 1973 pp. 77 ff., but it can function as an "ideal", *ibid.* p. 99.
- 4 Consider, e.g., the known differences between the Common Law systems and the continental European systems. In new legal systems, the doctrine of the sources of the law is unclear. In the European Community law, controversies occur concerning, *inter alia*, the role of the Community directives, not "transformed" by the internal legislation. These have been considered as binding in England, cf. Yvonne von Duyn case, Eur. Court Rept. 1974 p. 13-37, but not in France, cf. Cohn-Bendit case, Conseil d'Etat 12 Dec. 1978, Rev.trim. dir. Eur. 1979 p. 157.
- 5 In response to Strömholm's objection (1981 pp. 293 and 297), let us say clearly that I discuss material which one must, should or may cite, or use, or take into account (etc.) In justification of legal decisions, these terms are equivalent. To use or take into account an argument in a process of justification implies citing it. Using without citing is possible in decision-making only, not in justification. Cf. section 5.2.2. *infra*.
- 6 Cf. Eek 1972 p. 64.

2.2.2.

- 1 Cf. Harris 1979 p. 71: "a constitutional source-rule". Re Riksskatteverket see Welinder 1975 vol. 1 p. 27.
- 2 On the other hand, quoting these sources increases "force" of argumentation. If A quotes them, he creates a problem for B who disagrees with A; in some cases, a reversal of the burden of argumentation (cf. Alexy

1978 pp. 242 ff.) may occur: B would now be expected to show that A is wrong.

- 3 Cf. Aarnio 1979 p. 133.
- 4 Welinder 1975 vol. 1 pp. 26-27.
- 5 Schmidt 1955 influenced the subsequent evolution.
- 6 Cf. section 2.2.1.3. note 2 supra and Schmidt 1957 pp. 173 ff.
- 7 Cf. Eek et al. 1975 p. 109 and SvJT 1947 pp. 285 ff. Cf. Jägerskiöld 1959 p. 91.
- 8 Cf. Bengtsson 1976, section 4.1.
- 9 Hart 1961 p. 247 distinguishes between mandatory and permissive legal sources. Cf. Bodenheimer 1969 pp. 393-394: "Even in those cases where there are no positive sources of law helpful to the judge..., he is not left at large in finding a solution to his problem. ... (T)here are at his disposal many less formalized sources of adjudication."
- 10 Aulis Aarnio expressed this thesis in a discussion about the present work.
- 11 Eckhoff 1972 p. 316.
- 12 The use of repealed statutes as a should-source of the law does not create any logical contradiction: The act of derogation merely means that the statute is not to be regarded as a must-source.
- 13 Their use is thus neither prohibited nor damaging to the professional reputation of one using them. They usually strengthen the justification but do not have the special position of the must-sources and should-sources. When substantive reasons are used in the might-sources, their weight is greater than it would be, if they were used in materials which are not recognized as might-sources. Summers 1978 pp. 730 ff. claims, however, "the primacy of substantive reasons". He argues, inter alia, what follows: "A judge cannot apply a precedent wisely without determining which proposed application is most consistent with the substantive reasons behind the precedent." (p. 730). "Although precedents may provide answers, these answers may be (morally - AP) wrong." (p. 733). "(T)he conditions for the rational application of precedents are satisfied less frequently than many suppose." (p. 732). He concludes that "(s)ubstantive reasons, more than authority reasons, determine which decisions and justifications are best." (p. 730). Although I agree with most of Summers's concrete observations, I do not fully understand the last sentence. Moreover, the word "primacy" seems to be too strong. In the sense adopted in the present section, statutes and precedents have thus primacy before substantive reasons. (There are many senses of "primacy".) In any case, both authority reasons and substantive reasons are necessary for legal thinking. Cf. section 2.3.4. infra.

2.2.3.

- 1 Cf. Kelsen 1960 pp. 228 ff. The validity continues as long as there is no supervening act of derogation; cf. Maynez 1948 p. 461; cf. Ekelöf 1969 p. 116.
- 2 Cf. Merkl 1968 pp. 195 ff., Kelsen 1960 pp. 271 ff. and Paulson 1980 pp. 172 ff. This is legal errata sensu stricto. Cf. section 2.3.10.3. infra note 1 on legal errata sensu largo.
- 3 Cf. Raz 1970 pp. 60 ff. and 188.

- 4 Desuetudo is more than obsolescence. (Obsolescence does not exclude validity, cf. Allen 1958 p. 463 and Makkonen 1965 p. 65.)

2.2.4.1.

- 1 An example. In the case NJA 1937 p. 1, the Supreme Court pronounced that debts in dollars can be paid according to their nominal value despite the decline in the value of the dollar, but in the case NJA 1952 p. 382, the Court refused to recognize this principle as regards Polish zlotys. By the way of reason, the court stated that the zloty notes cannot, according to Polish statutes, be imported into Poland. Cf. Hjerner 1969 p. 30. Cf. also Jägerskiöld 1959 pp. 87 ff.
- 2 Cf. section 3.3.4. infra.
- 3 Cf. Eckhoff 1972 pp. 164 ff.
- 4 Robert Summers's formulation.
- 5 Cf. Simpson 1961 pp. 148 ff. and 1973 pp. 77 ff. Cf. Fuller 1946 pp. 376 ff.: to establish the ratio, one must mix "reason and fiat". Moreover, "the rules applied to the decision of individual controversies cannot simply be isolated exercises of judicial wisdom. They must be brought into, and maintained in, some systematic interrelationships; they must display some coherent internal structure." (Fuller 1968 p. 134). Cf. Aarnio 1979 p. 136. The ratio depends on relevancy of similarities between the cases, and the judgment of relevancy depends on the totality of coherent evaluations endorsed by the interpreter, cf. sections 5.1.4., 5.2.2. and 5.3. infra.
- 6 Cf., e.g., Allen 1958 pp. 231 (concerning English law).
- 7 Cf. NJA 1972 p. 253.

2.2.4.2.

- 1 Cf. Beckman 1962 pp. 157 ff.; Eek et al. 1975 pp. 109 ff.; Hjerner 1969 passim; Jägerskiöld 1959 pp. 65 ff.; Sjögren 1918 pp. 28 ff.; Strömholm 1981 pp. 333 ff.; Thornstedt 1956 pp. 12 ff.; Welamson 1976 pp. 615 ff.
- 2 Cf. Hjerner 1969 p. 4. Cf. Peczenik 1974 pp. 121 ff.; Schmidt 1955 p. 109. Bernitz 1976 pp. 89 ff.; Erenius 1971 pp. 128 ff.; Bengtsson 1972 pp. 82 ff.
- 3 Cf. SvJT 1947 p. 231, criticized by Schmidt 1955 p. 109. See also SvJT 1947 pp. 285 ff.
- 4 Cf. RB 3:5, para. 1. Cf. Agge 1969 pp. 60 ff.
- 5 Cf. Olivecrona 1943. pp. 92.
- 6 Cf. Govt. bill 1971 no. 45 for amendment of the Code of Judicial Procedure, etc., especially p. 88. Cf. Schmidt 1972 pp. 581-582. The amendments resulted in a more extensive justification of decisions, cf. Strömholm 1981 pp. 338 ff.

2.2.5.1.

- 1 Cf. section 2.3.9.4. note 2 infra.
- 2 But not hypothetical will; the latter construction leads to serious difficulties, cf., e.g., Aarnio, Alexy and Peczenik 1981 pp. 434 ff. (Aarnio). Cf. Strömholm 1981 pp. 403-404 and 1972 pp. 35 ff., Peczenik 1974 p. 111.

- 3 Interpretari nihil aliud esse, quam sensum auctoris ex eius verbis et ratione declarare, Eckhardus 1750 p. 2.
- 4 Cf. Wróblewski 1959 pp. 160-161 note 26.
- 5 Cf., e.g., Watson 1919 Ch. 1.
- 6 Tuomela 1977 pp. 39 ff. has developed a more sophisticated idea (of Sellars) that mental "acts" of thinking can be introduced by analogy to acts of speech. Cf. Chisholm 1966 pp. 62 ff.; cf. Hamilton 1854 pp. 449 ff.
- 7 Cf. Hägerström 1917 and 1953 passim; cf. 1939 pp. 213 ff. (209 ff.); Ötvecrona 1971 pp. 73 ff. and 1976 pp. 100 ff.
- 8 Cf. Peczenik 1974 pp. 112-113.
- 9 Cf. section 2.3.9.4. note 2 infra.
- 10 An additional ontological problem: the "legislature's will" is extracted from statements of the "legislature's" assistants (legislation committees etc.), not from the statements of the "legislature" itself (the Riksdag). Cf. Strömholm 1966:2 p. 216.
- 11 Cf., e.g., Welinder 1975 vol.1 p. 38.
- 12 Cf., Eckhoff 1972 p. 67.
- 13 Cf. Strömholm 1966:2 p. 214 and 1981 p. 329.
- 14 Cf. Eckhoff 1972 p. 67; Strömholm 1966:2 p. 214 and 1981 p. 328; Schmidt 1957 pp. 171 ff.
- 15 Cf. Eckhoff 1972 pp. 67-68.
- 16 Cf. Thornstedt 1955 p. 360 note 2.
- 17 Cf. Ekelöf 1951 p. 28 and Germann 1953 p. 52.
- 18 An exception: voting on preparatory materials for BrB, Riksdagens protokoll, I kammaren, No. 32, 1962, p. 118.
- 19 A reservation of Herlitz and J.W. Petterson to the report Kommunallagskommitténs betänkande I, SOU 1947:53, p. 163, cited by Schmidt 1957 p. 172. See also Hessler 1957 pp. 241 ff.
- 20 Cf. Eckhoff 1972 p. 68.
- 21 See note 19 supra.
- 22 Cf. Ekelöf 1958 pp. 94-95.

2.2.5.2.

- 1 Cf. Strömholm 1966:2 pp. 176 ff. and 1981 p. 320.
- 2 Cf. Germann 1967 pp. 66 ff.
- 3 On history cf. Sundberg 1978 pp. 142 ff. and 232 ff.
- 4 Cf. NJA 1972 p. 296; NJA 1976 p. 483; NJA 1977 p. 273; NJA 1952 p. 195. RÅ 1947 ref. 40 (compared with prop. 1944:263 p. 36). The claim of preparatory materials to be observed is not the same as the claim of the statute, cf. Strömholm 1981 p. 319; cf. NJA 1978 p. 581 and NJA 1975 p. 33. Cf. Lögdberg 1964 pp. 432 ff. Cf. Justice A. Köersner in SvJT 1928 p. 373. Cf. also a Norwegian case, Rt 1961 p. 212, cited by Eckhoff 1972 pp. 75 ff. Cf. Rt 1962 p. 9, Rt 1921 p. 406, Rt 1916 p. 648, etc. (Eckhoff 1972 pp. 77-78).
- 5 Cf. e.g., Schmidt 1976 p. 262: the statute gives merely general guidelines, preparatory materials give details. Hellner 1980 pp. 131 ff.

gives an example of an important rule which one can construe on the basis of sec. 15 of Konsumentkreditlagen only if one also pays attention to preparatory materials.

- 6 Cf. Schmidt 1955 pp. 103 ff., 1957 pp. 172 ff. and 1972 pp. 569 ff. Cf. NJA 1950 p. 483 cited by Schmidt 1957 p. 187. Ekelöf (compare, e.g., 1958 pp. 93 ff., 97 and 1973 p. 53 with 1958 p. 87 and 1973 p. 56) regards, however, precedents as more important than preparatory materials, whereas Aarnio 1979 pp. 134-135 gives priority to preparatory materials. Strömholm 1981 pp. 344-345 (cf. 1972:2 pp. 715 ff.) emphasizes complexity of the weighing necessary to order these two kinds of legal sources.
- 7 Cf. Eek et al. 1975 pp. 76 ff., Strömholm 1966:2 pp. 175 ff. and Strömholm 1981 pp. 320 ff. and 475-476.
- 8 Cf. Schmidt 1957 p. 170.
- 9 Cf. Schmidt 1957 p. 196 and Thornstedt 1960 p. 243. Sometimes preparatory materials age rapidly, cf., e.g., NJA 1952 p. 195 contrary to Govt. Bill of 1932 (No. 106, cf. NJA 1932 II p. 223).
- 10 Cf. Thornstedt 1955 p. 359.
- 11 Cf. Schmidt 1957 p. 174 ff. A stronger source-norm says that preparatory materials are relevant only if elucidating a concrete statutory provision; they do not justify entirely new rules, for which it is difficult to find indication in the text of the statute, cf. Schmidt 1955 p. 113 and 1957 p. 174. Cf. Lögdberg 1964 p. 438, Hesser 1957 pp. 241 ff., and Strömholm 1981 p. 330. Cf. Justitiekottet 1976/77:15.
- 12 Cf. Schmidt 1957 p. 175.
- 13 Hellner 1967 p. 195 has thus commented upon the antiquated HB 1:5 with the support of an inquiry of 1965 (SOU 1965:14 pp. 37 ff.).
- 14 Cf. Strömholm 1966:2 pp. 175 ff.

2.2.6.

- 1 Cf. Harris 1979 p. 79: "no rule with the complexity necessary to provide criteria of identity for all inferior rules can be seen to exist as part of the social practices of officials."

2.3.1.

- 1 But deduction is a part of these practices, cf. McCormick 1978 pp. 19 ff.

2.3.2.

- 1 Cf. Aarnio, Alexy and Peczenik 1981 pp. 152 ff.: "decision-transformation".
- 2 A valid general norm-transformation or individual norm-transformation presupposes that the sources of the law contain a "gap": they do not deductively entail a legally acceptable answer to some legal question. (These "gaps in the sources" are not identical to either "gaps in the statutes" or to "gaps in the (output-)law", discussed by Alchourrón and Bulygin 1971 pp. 128 ff.) Following Wróblewski 1959 pp. 299 ff. and Opalek and Wróblewski 1969 pp. 108 ff., I distinguish the following types of "gaps": (1) "Gaps" resulting from vagueness of the sources of the law; cf., e.g., Schweitzer 1959 pp. 64-76; Alchourrón and Bulygin 1971 pp. 33 ff.; Raz 1979:2 pp. 212 ff. (2) "Gaps" resulting from incompati-

bility of the sources; cf., e.g., Kelsen 1960 p. 254; Zittelman 1903 p. 27; Raz 1979:2 pp. 213 ff. (3) Axiological "gap", either preater legem (the sources lack a norm they ought to contain from the moral point of view) or contra legem (the sources contain a norm they ought not to contain from the moral point of view). A special case occurs when the case under consideration is described in a more vague terms than those used in the sources, cf. the sophisticated theory by Alchourrón and Bulygin 1971 pp. 117 and 137 ff. See also section 2.3.3. infra.

2.3.3.

- 1 Dworkin's definition (1977 p. 81): "... a particular lawsuit cannot be brought under a clear rule of law, laid down by some institution in advance". Cf. Morawetz 1980 p. 90: "what makes a hard case hard for a judge is that it presents a moral dilemma, or at least a difficult moral determination." The concept "hard cases" presupposes "gaps" in the sources of the law, cf. section 2.3.2. note 2 supra.
- 2 "Natural" in view of (contextually sufficient) juristic criteria of acceptability, not merely in view of psychology of legal thinking.
- 3 Cf. Peczenik 1979 pp. 6 ff. Cf. Krawietz 1981 pp. 333. Cf. Krawietz 1978 p. 218 and passim.
- 4 Cf. Peczenik 1979 p. 345. Cf. Nagel 1961 p. 74. It is natural to conceptually distinguish between such propositions as "my cat is black" and "my cat is evil". A different problem is whether some, or all, propositions of the first kind are justified in a way presupposing evaluations. Borrowing Aarnio's word, used in a somewhat different context (1978 pp. 52 ff.), one can speak about intertwinement of practical and theoretical discourse. Cf. Pöyhönen 1981 p. 229 and 1981:2 p. 132. Cf. Bhaskar 1979 pp. 78 ff. Cf. Petrażycki 1959 pp. 72 ff.

2.3.4.

- 1 Cf. Summers 1978 pp. 730 ff. Cf. section 2.2.2. supra note 13.

2.3.5.

- 1 Cf. Gény 1899. Cf. Friedmann 1969 p. 827. But Gény was critical of the celebrated "good judge" Magnaud, whose judgments expressed "a kind of anarchistic impressionism", Gény 1899 p. 303.
- 2 Cf. Ehrlich 1903; Kantorowicz 1906. Ehrlich 1967 p. 170 stated that he was in agreement with Gény.
- 3 Cf. Bolding 1969 pp. 59 ff. and 1968 passim, inter alia pp. 86, 91, 97, 107, 112. Bolding exemplified his method with a discussion of the case NJA 1968 p. 183. Cf. critical remarks by Schmidt 1972 pp. 575 ff.
- 4 Cf. also Hutcheson 1938 Ch. 2: "a hunch".
- 5 Cf. Winslade 1975 p. 384 on Leon Green theory.
- 6 Hence many writers criticize the so-called juridical logic, cf. Peczenik 1974 pp. 96 ff.
- 7 Cf. Jhering 1916 vol. 1 p. 339 ff.
- 8 Cf., e.g., Jhering, mainly 1916 and vol. III of 1888. Germann 1946 p. 9. Cf. Peczenik 1974 p. 153. Cf. infra section 2.3.9.4. about Ekelöf.

Cf. Heck 1932 pp. 155 ff. (Larenz 1975 pp. 53 ff.) Cf. Pound 1959 vol. 3 pp. 24-324. The law serves social engineering, cf. Pound 1923 pp. 150-165, and thus can influence interests and create new social conditions.

- 9 Cf. Lundstedt 1956 pp. 136 ff.
- 10 Cf. note 1 supra.
- 11 Cf. Viehweg 1953.
- 12 Cf. Perelman and Olbrechts-Tyteca 1958.

2.3.6.1.

- 1 On the distinction between I and II cf. Agge 1969 p. 63.
- 2 On subsumption cf. Engisch 1975 Ch. 3, Wróblewski 1974 pp. 33 ff., McCormick 1978 pp. 19 ff., Weinberger 1970 pp. 36, 141, 152, 243 and 360, Alexy 1978 pp. 17 and 274 ff., Alexy 1980 pp. 187 ff., Paulson 1980 pp. 175 ff., etc.
- 3 Cf., e.g., Strömberg 1980 pp. 92 ff.
- 4 Cf., e.g., Esser 1972 p. 82. Cf. sections 3.3.4., 3.3.5., 5.1.5. and 5.2.4. infra.

2.3.6.2.

- 1 Cf. Aarnio, Alexy and Peczenik 1981 pp. 152 ff.
- 2 Cf. Alexy 1978 pp. 17 ff. and Aarnio, Alexy and Peczenik 1981 p. 153.
- 3 Cf. Weinberger 1970 pp. 335-336 and Peczenik 1974 pp. 64-65. Wróblewski 1961 pp. 617 ff. has pointed out that this distinction cannot be determined absolutely and must be based on the accepted doctrine of interpretation.

2.3.6.3.

- 1 Cf., e.g., Savigny 1840 § 33: "vier Elemente...: ein grammatisches, Logisches, historisches und systematisches."
- 2 Cf. Wróblewski 1959 pp. 143 ff. and 399 ff.; Wróblewski 1963 section III (= Wróblewski 1979:2 pp. 44 ff.); Wróblewski 1964 section III (= Wróblewski 1979:2 pp. 17 ff.). Cf. section 5.2.3. infra.
- 3 Jan Hellner's remark, expressed in a discussion about the present work.

2.3.6.4.

- 1 Cf. critical remarks by Hult 1952 pp. 579 ff.
- 2 Cf. NJA 1962 p. 172.
- 3 Cf. Peczenik 1979 p. 260. Cf. NJA 1967 p. 164 (Justice Conradi).

2.3.6.5.

- 1 Cf. Heck 1932 p. 52; Ekelöf 1958 p. 82.
- 2 "And though a vague term clearly applies to some cases, as clearly fails to apply to others and doubtfully applies to others, yet it is impossible to draw general boundary lines between the three categories." - Raz 1979:2 p. 213.

2.3.7.

- 1 With regard to this formalization cf. Alexy 1980 pp. 187 ff. I use the symbol "C", instead of "T".
- 2 In judicial decision-making, the case under consideration is actual and "fixed". Legal dogmatics, see Ch 7, on the other hand, establishes the area of application of a legal norm by considering many imaginary cases. There is a relation of feed-back between the interpretation of the norm in abstracto and description of imaginary cases. (This point has been formulated after a discussion with Aulis Aarnio.)
- 3 I leave out of account the problem of giving a precise interpretation to the legal consequence "OR". On this point, cf. Rödig 1973 pp. 174 ff. and Wróblewski 1974 pp. 44 ff.
- 4 Regarding these concepts cf. Alexy 1980 pp. 190 ff. and Koch 1977 pp. 41 ff. See also Moore 1981 pp. 167 ff.
- 5 The text from the beginning of 2.3.7. to this point roughly corresponds to fragments of Aarnio, Alexy and Peczenik 1981 p. 153 (written by Robert Alexy).
- 6 Cf., e.g., the Swedish Liability for Damages Act 2:1.
- 7 Cf. Peczenik 1979 pp. 88 ff.
- 8 Cf. ibid. p. 117; two German cases quoted: RGZ 144,80 and RGZ 147,129.
- 9 Cf. Alexy 1978 pp. 273 ff., Koch 1980 pp. 62 ff. and Yoshino 1978 p. 283. Cf. Aarnio, Alexy and Peczenik 1981 p. 153 (Alexy). Symbols used: $(x) (...) =$ "for all instances of x, it is so that..."; $\rightarrow =$ "implies"; Cx (or: M^1x , M^2x , M^nx , Sx) = "x has the property C (or M^1 , M^2 , M^n , S); ORx (or ORa) = "x (or a) should, must, may, may not, etc. (any normative modality) do R.
- 10 Alexy 1980 p. 192, formula IR.2. Concerning the symbols, cf. note 9 supra. Cf. Alexy 1978 pp. 279, formula J 1.2.
- 11 Cf. Alexy, Aarnio and Peczenik p. 154 (Alexy), note 66.
- 12 Cf. Alexy 1978 pp. 275 ff., rules J 2.1. - J 2.5.
- 13 Cf. Wróblewski 1959 p. 248 and Maxwell 1953 pp. 12 and 15.
- 14 Cf. Wróblewski 1959 pp. 247 ff., note 119; Guardians of Parish of Brighton v. Guardians of Starnd Union, 1891, 2 Q.B. 156 at p. 167, Lord Esher, M.R.
- 15 Cf. Wróblewski 1959 pp. 247 ff., quoting Polish cases. This norm is, however, controversial, cf. Hellner 1969:2 p. 135.
- 16 Cf. Wróblewski 1959 pp. 245-246.

2.3.8.

- 1 Cf. Aarnio, Alexy and Peczenik 1981 pp. 154 ff. (Alexy) and Alexy 1979:2 p. 68 note 64.
- 2 Among many reasons for elimination mention must be made that the norm in question does not fulfil the required minimum of efficacy or minimum of moral acceptability. Dreier 1981:2 in fine includes these reasons into the Grundnorm. Violation of this Grundnorm eliminates a given norm from the legal order. To reject the law-character of the normative order as a whole, this order must also violate another, much lower, minimum of moral acceptability. Cf. section 1.5. supra.

2.3.9.2.

- 1 Example: SvJT 1972 ref. p. 1; NJA 1969 p. 172; NJA 1965 p. 345; NJA 1961 p. 124; NJA 1936 p. 598 (cf. Schmidt 1974 pp. 86-87 note 26; Walin 1971 p. 64): the "basis" for the contract-law invalidity rules was applied to family-law agreements. "Basis for" = "analogy from"; de Geer 1953 p. 6.
- 2 The relation of analogy is symmetrical and reflexive but not transitive. See, however, Frändberg 1973 p. 138 note 32 and pp. 150-151 (irreflexive, symmetrical or not) and Koch and Rüssmann 1982 p. 260 (transitive).
- 3 A use of similarity argument which does not extend the area of application of a statute (*analogia intra legem*, cf. Nowacki 1966 pp. 45 ff.; *innertatbestandliche Analogieschluss*, Helter 1961 pp. 87 ff.; cf. Eckhoff 1972 p. 136) does not constitute a statutory analogy.
- 4 Cf. also Eckhoff 1972 pp. 130 ff. and Frändberg 1973 pp. 94 ff. and 173 ff.
- 5 Cf. Ross 1958 p. 149.
- 6 It is also meaningful to discuss whether a given argument is a statutory analogy or extensive interpretation.
- 7 Cf. Peczenik 1971 pp. 334 ff.
- 8 Cf. examples in Peczenik 1974 pp. 82 ff. concerning, e.g., the implicit assumptions of contracts, cf. Vahlén 1951 pp. 177 ff. and 225 ff. and Hollo 1981 pp. 140 ff.
- 9 Cf. Nowacki 1966 p. 131.
- 10 Qui dicit de uno negat de altero.
- 11 Strong *argumentum e contrario* is, however, deductively valid when the premise says that only chess players are qualified for membership in the club, etc. Cf. Klug 1966 pp. 129-132, Alexy 1978 p. 342 (J.15), and Koch and Rüssmann 1982 pp. 260-261.
- 12 Cf. Klug 1966 pp. 129-132.
- 13 Cf. sec. 3.3.1. note 9. Statutory analogy is a special case of the principle of universalizability and equality, cf. Alexy 1978 p. 344 and sections 4.1.3. and 6.2. infra.
- 14 Cf. section 3.3.1. infra.
- 15 One can do it via addition of non-analytic premises, cf. Alexy 1978 p. 343.
- 16 Ross 1958 p. 154 has concluded that "the maxims of interpretation are not actual rules, but implements of a technique which - within certain limits - enables the judge to reach the conclusion he finds desirable in the circumstances, and at the same time to uphold the fiction that he is only adhering to the statute and objective principles of interpretation." I would emphasize the words "within limits" and the word "only", disagree with the word "fiction", and endorse Schmidt's opinion: "The old technique relies upon the principle that the judge should never create norms which are altogether new but should seek his guidance in rules which have already been recognized for other situations." (Schmidt 1957 p. 195).
- 17 Cf. Ross 1958 p. 150. In other words, the precise interpretation of the clause is "under 18 years = minor", not merely "under 18 years → minor" (Ota Weinberger's remark in a discussion about the present work).

- 18 Cf. The draft of the Contracts Act, 1914, p. 140. Cf. Adlerkreutz 1969 p. 115. Cf. Schmidt 1960 p. 184.
- 19 Cf. Iuul, Ross and Trolle 1967 pp. 118-119 (an example).
- 20 Cf. Engisch 1968 pp. 147 ff. There are, however, examples of strong reasons telling against this principle (ibid. p. 148: "Der Satz 'singularia non sunt extendenda' ist also mit grösster Vorsicht zu handhaben"). There are also examples of express rejection of the principle by the courts, cf. Germann 1967 pp. 60-63.
- 21 Cf. Peczenik 1974 p. 88 and Hessler 1970 p. 24 (an example).
- 22 Cf. an example in Peczenik 1974 p. 89; cf. Ljungman 1971 p. 70.
- 23 See also Alchourrón and Bulygin 1971, e.g. pp. 167 and 176.
- 24 Cf. Thornstedt 1960 pp. 213 ff.
- 25 Beckman et al. 1970 vol. 1 p. 280.
- 26 Cf. Welinder 1975 vol. 2 pp. 242-243.
- 27 Cf. Hult 1952, in: Studiematerial i allmän rättslära, Stockholm 1971 p. 51 (an example).
- 28 Eek et al. 1975 p. 123.
- 29 Cf. Schmidt 1959 pp. 319 ff.; Makkonen 1965 pp. 100 ff.; Bengtsson 1969 passim. (The question whether cohabitation resembling marriage should be judged by analogy to rules about marriage or by analogy to rules about commercial partnership.)

2.3.9.3.

- 1 SN IV CR 1079/55. Cf. Peczenik 1962 pp. 123-149 (p. 143).
- 2 SN III CR 458/57. Cf. ibid. p. 144.
- 3 W. Wolter's lecture in Cracow, 1956.
- 4 Cf. Jägerskiöld 1969 p. 66.
- 5 Cf. Weinberger 1970 pp. 336 ff.: "rhetorische Figuren". Klug 1966, § 12, regards argumentum a fortiori as deductive, but he interprets it in a very restrictive way, that is, as the reasoning:
 (If) All S are P

 (Then) Some S are P.

See also Koch and Rüssmann 1982 p. 259.

2.3.9.4.

- 1 The logical structure of the reasoning is:

- (1) OZ
- (2) $\sim M \rightarrow \sim Z$

-
- (3) OM

where "Z" is the purpose, "M" is the means, and "O" means "ought to".
Cf. Alexy 1978 p. 297. The relation between "Z" and "M" "stützt sich auf die Kausalbeziehung. Wenn die entsprechende Kausalbeziehung besteht,

ist - die Zielsetzung vorausgesetzt - die teleologische Beziehung begründet." (Weinberger and Weinberger 1979 p. 141).

- 2 One must distinguish between the historical purpose, expressed in the actual will of the persons participating in legislation, and reconstructed purpose (ratio, see also section 2.2.5.1. supra. Cf., e.g., Klami 1980 p. 17: "one cannot historically 'detect' the real system of values and goals. (...) The finalistic theory is not a method for realizing the legislator's intentions." Fuller (1968 pp. 85 ff.) wrote that no "enacted law ever comes from the legislator wholly and fully made". Cf. Engisch 1968 p. 74, Larenz 1975 pp. 322 ff. (the objectively-teleological method); Aarnio 1981 p. 38 and 1979 p. 134, Strömholm 1981 pp. 325 ff. etc. Cf. Thibaut 1802 p. 103: "Die Raison des Gesetzes" is "durch eine Art juristische Fiktion als besonderer Wille des Gesetzgebers zu betrachten."
- 3 Cf. Fuller 1958 p. 667 on "the putting of hypothetical cases". "Any judicial opinion... which finds a plain meaning in a statute without consideration of its purpose... is deserving of nothing but contempt" (Hart and Sacks 1958 p. 1157).
- 4 Cf. Ekelöf 1958 pp. 84 ff. and 105 ff., 1973 pp. 53 ff. and 1951 p. 31.
- 5 Cf. Ekelöf *ibid.* Cf. Hart and Sacks 1958 p. 1153: "an expectation that interpreters of the statute would resolve cases of doubtful application by an effort to discern the purpose behind the instances of clear applicability (and inapplicability) and to arrive at conclusions consistent both with this purpose and these instances". But when determining "the purpose behind the instances of clear applicability", Hart and Sacks assume a different priority order of reasons than Ekelöf: The linguistic sense of the statute is relatively less important for them (although certainly not totally irrelevant).
- 6 Ekelöf is quite restrictive in his use of the legislative preparatory materials, cf. Ekelöf 1958 pp. 93 ff., 97 and 1973 p. 53.
- 7 Cf. Ekelöf 1958 p. 87 and 1973 pp. 55-56.
- 8 Ekelöf 1958 p. 84.
- 9 Cf. Ekelöf 1951 pp. 23, 28 and 29.
- 10 Cases which are clearly covered by the letter of the law but which in some respect are not typical, are not considered to be "certain". Cf. Ekelöf's expression about "special circumstances" which make a "mechanical application of the statute"... "militating against its purpose" (1958 p. 84). Ross 1953 p. 171 n. 2 has thus held that it is not possible to establish which cases are "certain" and which are "uncertain" before the purpose of the statute has been determined. Cf. Thornstedt 1960 p. 238. In my opinion, one should aim at a reflective equilibrium of one's views about the "certain" cases and one's views about the purpose of the statute, cf. section 3.3.4. *infra*.
- 11 Cf. Ekelöf 1958 pp. 84 ff., 105 ff. and 1973 pp. 54 ff.
- 12 Cf. Ekelöf 1958 pp. 110-112 (an example).
- 13 Cf. Thornstedt 1960 pp. 229 ff.
- 14 *Ibid.*
- 15 Cf. Ross 1953 p. 171 n. 2.
- 16 Cf. Ekelöf 1973 p. 55.

- 17 "Rules and other legal precepts characteristically have more than one goal... Thus, we may usually attribute to a rule or other precept directing behavior one or more 'immediate' goals, one or more 'intermediate' goals, and one or more 'higher-level' or 'ultimate' goals." (Summers 1981 p. 884). Cf. Alexy 1978 p. 298. Cf. Esser 1972 p. 102. Cf. Weinberger and Weinberger 1979 p. 142.
- 18 Functional analogy, cf. Frändberg 1973 pp. 127 ff. Cf. Strömholm 1966 p. 75: identité fonctionnelle.
Frändberg 1973 pp. 143 ff. has elaborated a theory of statutory analogy founded on the concept of "legal basis" of a legal norm, n, defined as "a desirable state of affairs, t, such that n is an instrument of achieving t." (p. 172). Two norms are analogous if they have common legal basis and if this common basis is so strong that it overrules other legal bases.

2.3.10. title

- 1 Cf. Peczenik 1981:2 passim.

2.3.10.1.

- 1 Cf. Peczenik 1974 pp. 59 ff.
- 2 See also Frändberg 1973 p. 87.
- 3 Cf. Beckman et al. 1970 p. 105 and the case SvJT 1966 rf. p. 57.
- 4 Beckman et al. 1970 p. 106.

2.3.10.2.

- 1 Cf. supra sections 2.3. and 3.3.1. passim.
- 2 The sources of the law ("the input law") can be inconsistent, the interpreted law ("the output law") should be consistent.
Paulson 1980:2 pp. 500 ff. (cf. 1979 pp. 1 ff.) has written that "presumptively" valid norms can be incompatible; the incompatibility is set aside when one presents "evidence", required by the law, that one of these norms should be applied and the other not. In my opinion, a strong version of a value-objectivist (cognitivist) ontology is required to interpret setting aside incompatibilities of norms as a matter of a purely cognitive proof or evidence (not merely a quasi-cognitive one, see section 3.3.1. infra.)
- 3 Kelsen, who originally argued that incompatible norms cannot be simultaneously valid, changed his opinion in 1962 pp. 1429 ff.
- 4 Cf. Alexy 1978 p. 306 (J.8).

2.3.10.3.

- 1 Sensu largo. On legal errata sensu stricto cf. section 2.2.3. supra note 2.
- 2 Section 2.2. passim.
- 3 Cf. Aarbakke 1966 pp. 499 ff.
- 4 Cf. Aarnio, Alexy and Peczenik 1981 pp. 151 ff. (Cf. Peczenik 1974 p. 49; Alexy introduced the term "prima facie" to this context.) Cf. Germann 1964 pp. 235 ff. concerning "the paramountcy of statute".

5 Cf. Alexy 1978 p. 339 (J.14).

2.3.10.4.

1 Cf. Alexy 1979:2 pp. 71 ff.

2 Cf. Weinberger and Weinberger 1979 p. 132.

3 Eckhoff 1972 p. 302. Another example, cf. Ross 1968 p. 174.

2.3.10.5.

1 When meta-norms collide, one may need meta-meta-norms, etc., cf. Strömholm 1972:4 p. 360 about "priority systems".

2.3.10.6.

1 Cf. Alexy in: Aarnio, Alexy and Peczenik 1981 p. 156.

2 Cf. Alexy 1980 pp. 194 ff., 203 ff.

2.3.10.7.

1 Cf. the Instrument of Government (Regeringsformen), 1974, Ch. 8; cf. Petrén and Ragnemalm 1980 pp. 166 ff.

2 Established in Marbury v. Madison, (1803), 1 Cranch (United States Supreme Court Reports) 137 and constituting the cornerstone of American constitutional law.

3 Grundgesetz, Art. 100 Abs. 1 S.1.

4 Cf. Petrén and Ragnemalm 1980 pp. 304 ff. Concerning the older law cf. Petrén 1956 pp. 504 ff. and Undén 1956 pp. 260 ff. (The Danish courts were also extremely cautious when exercising judicial review, cf. Iuul, Ross and Trolle 1967 p. 91. In Norway, the right of review has been expressly confirmed in Rt 1918 I p. 401; cf. Eckhoff 1972 p. 198.)

5 I thus disagree with the conclusion (by Iuul, Ross and Trolle 1967 p. 91; cf. Ross 1958 p. 132) that in such cases we rather have the principle Tex inferior. Cf. section 7.3.4. note 8 infra.

6 On the other hand, the principle lex superior is restricted when the constitution empowers the legislator to amend certain constitutional provisions by means of an ordinary statute; cf. Herlitz 1972 p. 537.

7 Cf. Eckhoff 1972 pp. 282 ff.

8 Cf. Peczenik 1974 p. 107; SvJT 1958 rf 63 and Welamson 1965 p. 74 n. 7 (an example). Cf. Klami 1980 pp. 45 ff. and Zippelius 1980 pp. 48-54. Cf. Germann 1967 p. 62 (Switzerland: BGE 73, II, 110 and 126; BGE 90, II, 192. Federal Republic of Germany: BGHZ 2, 355.)

2.3.10.8.

1 Cf. Eek et al. 1975 pp. 109-110. Cf. Mr. Justice Tammelin in NJA 1953 p. 524 (cf. NJA 1952 p. 240).

2 Cf. Eckhoff 1972 p. 178.

3 Some exceptions: NJA 1956 pp. 318, 430, 596, 670 and 688; cf. Eek et al. 1975 p. 133 (a summarily reported case quoted in later cases).

- 4 Cf. Eek et al. 1975 p. 110; cf. NJA 1951 p. 688.
- 5 Cf. Lögdberg 1964 p. 440 and Thornstedt 1960 p. 243.
- 6 Cf. Lögdberg 1964 p. 438 and Schmidt 1957 p. 174.
- 7 But Ailinpieti 1980 gives examples of violation of C11.
- 8 Cf. Welinder 1975 vol. 2 p. 232 (examples from taxation law).
- 9 Cf. Ailinpieti 1980. Cf. Prop. 1971:10 pp. 252 ff. and SOU 1969:42 p. 229.
- 10 See also Thornstedt 1960 p. 243.
- 11 Cf. Schmidt 1955 pp. 114 ff.
- 12 C 14 has been influenced by Jan Hellner's views. Cf. section 2.2.5.2. supra, S 5 with references.

2.4.

- 1 And "non-inductive", cf. section 3.1.2. infra.

3.1.1.

- 1 Joseph Raz asked this question in a discussion about the present work.
- 2 Similar problems occur as regards implicit rejection of norms, cf. Alchourrón and Bulygin 1981 p. 109. Cf. Alchourrón and Makinson 1981 and 1983 passim, re logical problems relevant in this context. Cf. Weinberger 1981:2 p. 329: "Begründungsstrukturen, die nicht in Form einer 'Prämissen-Konklusion'-Kette dargestellt werden können".
- 3 Symbols: p = explicit premise, q = conclusion, $r_1, r_2, s_1, \dots, s_4, t_1, \dots, t_8$ = added premises.

3.1.2.

- 1 In principle, fuzziness is a property of objects, not of facts, while vagueness is a property of language, cf. Rolf 1981 p. 22 note 9. A person who speaks in the legal language may thus notice its vagueness. A person who speaks in a meta-language about the legal language may, on the other hand, notice the fuzziness of the law. I do not express any opinion about the so-called fuzzy logic, cf. Black 1937 and Zadeh 1975. It seems that such a logic must be based on classical logic, Rolf 1981 p. 120. But I agree with Wróblewski 1983 that "the rational decision-maker taking into account the fuzziness of the legal system... will not seek for certainty where there is no possibility to reach it, neither in the area of interpretation nor in that of validity."
- 2 This list has been inspired by a discussion with Roseph Raz.
- 3 Cf. Hart 1961 pp. 124 ff. on "open texture".

3.1.3.

- 1 Cf. Castañeda 1973 pp. 69 ff. and 1975 p. 333 on "bridging implications".
- 2 Cf. supra section 1.4.4.1. note 6.
- 3 Cf. Quine 1953 p. 19.

3.1.4.

- 1 By the term "knowledge" I do not, in the following discussion, mean the deductive information.
- 2 Cf., e.g., Ross 1958 pp. 151 ff., with the conclusion about "the judge's legal-political activity" (p. 156), and p. 337: "Because the relation between arguments and conclusion does not have a logical character, the third and final link in legal politics... is the expression of a personal reaction... This alogical jump...". In brief: legal reasoning is legally-political and legal politics is alogical and "personal".

3.2.1.

- 1 Cf. Patzig 1976 p. 23.
- 2 Kant's definition was narrower: truth of analytic proposition is derivable from the principle of non-contradiction; cf. Kant 1781 (7) A 151, B 190. Cf. Patzig 1976 p. 22.
- 3 Cf. Pap 1958 p. 44, p. 4e. Cf. Frege 1950.
- 4 Carnap 1956 p. 222.
- 5 Ibid.
- 6 Another example: If A has a right against B to receive \$ 100 from B, then B has a duty to give A \$ 100.
- 7 Carnap 1956 p. 222 ff.
- 8 Cf. Kemeny 1952 pp. 38 ff.; Pap 1958 p. 89; Ajdukiewicz 1965 p. 80.
- 9 A problem: Quine 1953 pp. 36-37: "It is obvious that truth in general depends on both language and extralinguistic fact. The statement 'Brutus killed Caesar' would be false if the world had been different..., but it would also be false if the word 'killed' happened rather to have the sense of 'begat'... (I)t... seems reasonable that in some statements the factual component should be null; and these are the analytic statements. But... a boundary between analytic and synthetic statements simply has not been drawn." Cf. Rescher 1977 pp. 245 ff., 250 ff.; Pap 1958 p.93; Beck 1965 p. 92.
- 10 The question, what interpretations are reasonable, may be studied according to the paradigm established by Naess 1953.
- 11 Alexy in Aarnio, Alexy and Peczenik p. 141.
- 12 Cf. Gallie 1965 pp. 167-168 on "contested concepts".
- 13 The most important philosophical example is explication: "By the explication of a familiar but vague concept we mean its replacement by a new exact concept; the former is called explicandum, the latter explicatum", Carnap 1956 p. 7. Ajdukiewicz, e.g., 1934 p. 214 used a similar method of paraphrases. According to Woleński 1980 p. 56, the presupposition method (cf. section 1.3.3. note 4 *supra*) and a list of examples prepare the explicandum for paraphrases (or explications).
- 14 Cf. Petrażycki 1959-60 vol. 1 pp. 123 ff.
- 15 Cf., e.g., Kant 1781 (7), A2, B2.
- 16 "Empirically" sensu largo, including linguistics, study of literature, etc.
- 17 "Eine Schicksalsfrage der Philosophie", Stegmüller 1954 pp. 535 ff.

- 18 Kant's main examples of synthetic a priori are geometry, arithmetic, the law of preservation of substance, the law of equivalence of action and reaction, etc., cf. Kant 1781 (7) B 17. Cf. Patzig 1976 p. 25.
- 19 Cf. Kant 1781 (7) B3 and B4. Cf. Patzig 1976 pp. 19-20.
- 20 Beck 1965 p. 96. But "it is ... granted that the development and progressive articulation of a body of knowledge can alter the attribution of necessity to a given statement", ibid. p. 92. Popper has reinterpreted "Kant's a priori so as not to mean 'objectively valid' but 'prior to sense experience'", Popper in Schilpp 1974 vol. 2 p. 1064. Cf. Stegmüller 1976 pp. 218-219 on a priori relatively to a given theory. Cf. Gärdenfors 1980:2 p. 104.
- 21 Stenius 1960 pp. 218-219: "Whereas Kant thought 'possible to theoretical reason' to be more narrow concept than 'logically possible', these two concepts are identical according to Wittgenstein". Cf. Wittgenstein 1967:2 p. 68; 1964 p. 78; 1922 No. 6.3., 6.31., 6.32., 6.321., 6.3211., 6.36., 6.362.

3.2.2.

- 1 Consequently, "Harris includes both derogation and non-contradiction in his (basic legal science) fiat", Paulson 1981 p. 805, cf. Harris 1979 p. 70. On the other hand, "Kelsen regards the traditional counterparts to derogation (for example, lex posterior derogat legi priori) as positivistic and contingent", Paulson ibid. The rationale of Kelsen's view seems to be as follows: Only the most basic (and most vague) juristic transformation-rules are such that whoever does not follow them is, in all reasonable interpretations of the involved words, not to be regarded as a lawyer. Other juristic transformation-norms are (positively) legal, (legally) ideological, or invented ad hoc.

3.3.1.

- 1 Cf. "the second conclusion" (section 2.4. supra).
- 2 Cf. sections 1.4., 2.2., and 2.3. The role of evaluations is greatest at the third stage and most limited at the first.
- 3 Cf., e.g., Olivecrona 1971 pp. 200-206.
- 4 Cf. Peczenik 1977 pp. 112 ff.: juristic operationism. Cf. Lins 1971 p. 50: "Law is.. the result of cognitive operations on factual, normative and axiological data". I would rather say: ... of cognitive and evaluative operations...
- 5 Cf. Peczenik 1974 pp. 62 ff. on punishment for denegatio iustitiae. Cf. Code Napoléon sec. 4: Cf. Frändberg 1973 p. 161.
- 6 Cf. Olivecrona 1971 p. 35 with references.
- 7 Sometimes, such questions are admissible; some examples (compiled by Strömberg 1971): Corpus iuris civilis, Codex 1-17-2-21. Ordonnance civile touchant la réformation de la justice (1667), I, ABGB 1786 Theil I § 26. Allgemeines Landrecht für die preussischen Staaten 1794 §§ 47, 48. Cf. the old Swedish Constitution of 1809, RF sections 20, 83, 88, considered, however, to be obsolete already before the change of the constitution, cf. H. Strömberg 1968 pp. 130 ff.
- 8 Cf. McCormick 1978 p. 53. (A minority, e.g., the rule-skeptics, prefers another interpretation, cf., e.g. Frank 1930 p. 50.) Consequently, "legal science has to insert...unappealable decisions into the corpus

of the law by virtue of a forced subsumptive relation, even if, critically, the relation is denied", Harris 1979 p. 87. See, however, Paulson 1981 p. 816.

See also Weber 1978 pp. 809 ff. on the comparison with other legal cultures.

- 9 In many works, I have pointed out that "in legal practice there is a compromise between the principle of the strict observance of law, and the principle of justice", Peczenik 1967 p. 138 (=1969:2 p. 36). Cf. Peczenik 1966 p. 72 and 1969 p. 43 (=1969:2 p. 56). A terminological complication: one can use the term "the rule of law" (Rechtssicherheit, in Polish praworządność) both as referring to this compromise and as referring to one of its two components, that is, the strict observance of law; in 1966, I have used the latter convention.

Cf. Opalek and Zakrzewski 1958 pp. 19 and 31-35. Cf. Cohen 1964 pp. 425-426; Wróblewski 1972 pp. 371 ff.

3.3.2.

- 1 Mackie 1977 passim.

3.3.3.

- 1 A remark made by Aulis Aarnio in a discussion about the present work.
- 2 Cf. Weinberger 1971 p. 400: "Die Norm ist grundsätzlich systemrelativ." Cf. Aarnio 1979 pp. 155-156.
- 3 Cf. Moritz 1968 p. 35.

3.3.4.

- 1 Cf. Rawls 1973 p. 20. Cf. Prawitz 1978 p. 153. Cf. Kaptein 1978. See also sections 5.1.5., 5.2.4. and 1.4.3. n. 12 (re Eckhoff and Sundby).
- 2 Cf. Ofstad 1980 p. 98 re "the norm of consistency". Cf. criticism by Bergström 1980 pp. 46-47.
- 3 Cf. Otte 1980 p. 196, quoting Grotius.
- 4 Cf. section 7.1.6. infra.
- 5 They work as "data" when used, e.g., as "rightness reasons", cf. section 2.2.1.1. supra. On the other hand, no general propositions are data of natural science!
- 6 Cf. Nowell-Smith 1973 p. 316. Why are moral systems unstable? Because "a will must be conceived as... free" (Kant 1788 p. 29)? This circumstance makes it impossible to program a computer to act like a judge or like a legal scholar, cf. Peczenik 1978:2 p. 110. In other words, pragmatical factors influence the reflective equilibrium. (Cf. Weinberger 1976 pp. 20 ff. and 1977:2 re the distinction between semantically-syntactical and pragmatical languages). Cf. Opalek and Woleński 1975 p. 66.
- 7 I am indebted to Aulis Aarnio, Robert Alexy, Niilo Jääskinen and Juha Pöyhönen for critical remarks that led to some changes of this theory.
- 8 Cf. Bodenheimer 1969 pp. 399-400; Perelman and Olbrechts-Tyteca 1969 pp. 5 ff.; Dewey 1924 p. 26.

3.3.5.

- 1 Cf. section 7.1.3. infra.
- 2 Cf. Stegmüller 1975 pp. 84-85.
- 3 Rescher 1977 p. 103, referring to Bollnow 1936 on Dilthey.
- 4 Cf., e.g., Hassemer 1968 p. 107: "hermeneutische Spirale". Concerning juristic reception of philosophical hermeneutics cf., e.g., Frommel 1981 pp. 41 ff. and 44 ff. Cf. Betti 1954, Gadamer 1960; Coing 1959, Esser 1964:2 and 1972, Larenz 1975, Hruschka 1965, Kaufmann 1972, Müller 1971; Aarnio 1977. Cf., however, Studnicki 1977 pp. 161 ff. on "major similarities and dissimilarities between lexicographer's and jurist's elucidations of lexical meanings."
- 5 Cf. Aarnio 1979 pp. 153-154.
- 6 Cf., e.g., Aarnio 1979 pp. 154-155.

3.3.6.

- 1 Cf., e.g., Ross 1958 pp. 135-136; "(C)urrent theories of interpretation ...are... valueless... for the understanding of positive law". Cf. ibid. pp. 155 ff.
- 2 Aarnio 1983, section III.1.2. in fine, points out that the legal text has the content that is presented by the lawyers who interpret it.
- 3 Dworkin 1977 p. 87, expressed "the rights thesis, that judicial decisions enforce existing political rights" (cf. ibid. pp. 82-90, 31-35 and 68-71.). The rights are "described" by principles, ibid. p. 90, and these express "a sense of appropriateness developed in the (legal) profession and the public over time", ibid. p. 40. In brief: the lawyers use their sense of appropriateness to discover the legal rights.
- 4 Lang 1962 has written that the law has a complex ontological structure in a semantical sense (pp. 25 ff. and 59 ff.): one cannot identify any of its "planes" (cf. supra section 1.2.1. note 1, e.g., behaviour, mental processes and norms) without paying attention to other planes (p. 62 and 73). Cf. also Peczenik 1968 pp. 234 n. 12 and 242-243: a suggestion that a lawyer must abandon the concept "the law" and use simpler concepts like "legal norm". (But, let us add now, the lawyer often needs the complex and obscure concept "the law", although I am not sure whether a complex and obscure ontology is presupposed by this concept.) Cf. Opalek 1962 pp. 109 ff.
Cf. Klami 1980 p. 12: "law is ontologically a dualistic phenomenon. It consists both of norm and of conduct. They are connected with each other in a peculiar manner." Epistemology of law must use evaluative methods (p. 14).
Radbruch 1950 p. 123 (the theory first published 1914) has pointed out that "Recht ist die Wirklichkeit, die den Sinn hat, dem Rechtswerte, der Rechtsidee zu dienen", and added three possible viewpoints on it, p. 96. Reale 1962 pp. 343 ff. (cf. Laakso 1980 p. 291) sees an ontological totality composed of three elements: fato, valor, norma. Cf. Recaséns Siches 1959 p. 159 (Laakso 1980 p. 299). Cf. Laakso's own theory, 1980 pp. 313 ff. and 1979 pp. 75 ff. Hall 1947 p. 313 (Laakso 1980 p. 303) has written about the totality composed of value, fact and idea (form). Cf. Hall 1973 pp. 54-77. Mention must also be made about Kubes 1977 (Laakso 1980 p. 300), in connection with Hartmann and Scheler. See also supra section 1.4.4.1. on institutional facts.

Similar ontological problems are presupposed by the thesis that the

jurists "presume" that the actual legislator is rational; they accept the "presumption" without proof (Nowak 1968 p. 166 and 1973 pp. 35 ff.). Cf. Savigny 1840 vol. 1 p. 292: legislator must have made consistent evaluations. In my opinion, jurists need no "presumption" but merely a rule that they should interpret the law rationally, cf. Ch. 4 infra. Cf. Peczenik 1969 pp. 41-42 (=1969:2 pp. 52 ff.) The ontological problems occur only if one assumes that the jurist's activity is purely cognitive, not merely quasi-cognitive, cf. section 3.3.1. supra.

5 Cf. Dworkin 1977 pp. 159 ff.

4.1.2.

1 The term used, among others, by Cherniak 1981 pp. 161 ff.

2 Cf. Black 1977:3 p. 67: "action in the face of uncertainty or risk shall count as rational to the extent that it is supported by the agent's good reasons." Cf. Gibson 1960 p. 43. Cf. Jareborg 1975 p. 162.

A theory of rationality must discuss the question which reasons are good. For instance, Burks 1977 p. 315 has concluded that "rationality has at least two modes: deductive rationality, and reasoning and acting in accord with standard inductive logic. There may also be an ethical rationality". In the context of rationality of action, one must mention Simon 1957 and Gibson 1960 pp. 156 ff. (Cf. Russell 1954, preface, and criticism by Black 1977:3 pp. 65 ff.) Weber 1978, in a more specific context, made the distinction between purposive, affectual, traditional and value-rationality. The recent trend is towards a detailed description of conditions of a rational discourse, cf., e.g., Habermas 1973 pp. 255 ff. about the ideal speech situation as a condition of a rational discourse. Alexy's theory, which constitutes our point of departure, has been influenced by Habermas, cf. Alexy 1978 pp. 155 ff.

3 Or: a necessary condition of human knowledge.

4 Ota Weinberger's remark in a discussion about the present work.

5 Alexy in Aarnio, Alexy and Peczenik 1981 pp. 266 ff.

6 Alexy 1978 pp. 234 ff.

7 Ibid.

8 Ibid. pp. 238 ff.

9 Ibid. pp. 242 ff.

10 Ibid. pp. 250 ff.

11 Ibid. pp. 254 ff.

4.1.3.

1 From this point of view, similar problems occur as regards theoretical and practical rationality. Cf. Hare 1963 pp. 10 ff. on universalizability of descriptive and moral judgments.

2 Cf. Peczenik 1966 pp. 50-72 on analogies between induction and justice. Cf. Habermas 1973 p. 251: analogy between induction and universalizability.

3 Cf. Popper 1959 pp. 423 ff.

4 Cf. Petrażycki 1959 pp. 153 ff., 178 ff. and 193 ff. But: "Laws which are applicable to entire classes of objects often emerge out of partial laws..." (Kotarbiński 1975 p. 20).

- 5 Cf. Rescher 1973 pp. 169 ff.
- 6 Kant 1785 p. 421 (Engl. transl. p. 44).
- 7 Cf. Kant 1788 p. 29 (Engl. transl. p. 28).
- 8 Kant 1785 p. 432 (Engl. transl. p. 58).
- 9 Cf. Hare 1972 p. 4.
- 10 Lucas 1980 pp. 43-44.
- 11 Ibid. p. 44. Cf. Nowell-Smith 1969 p. 309. Cf. Sidgwick 1907 p. 379. Cf. Mackie 1977: "The first stage of universalization: the irrelevance of numerical differences" (p. 83). "The second stage of universalization: putting oneself in the other person's place" (p. 90). "The third stage of universalization: taking account of different tastes and rival ideals" (p. 92). Cf. Alexy 1978 pp. 250 ff. Concerning formally-logical problems, cf. Rabinowicz 1979 passim.
- 12 Cf. section 6.2. infra.
- 13 Cf. Weinberger 1979:2 p. 133.

4.1.4.1.

- 1 Max Black's metaphor.
- 2 On relations between causal and intentional explanation cf. v. Wright 1971 Ch. III. Cf. Weinberger and Weinberger 1979 pp. 140 ff.
- 3 Max Black's formalism.
- 4 This derivation is, of course, non-deductive (a "jump"). Its deductive counterpart is the following modus ponens:

$$\begin{array}{l} p \\ K \ (p \rightarrow q) \\ \hline K \ (q) \end{array}$$
- 5 Robert Alexy's remark.

4.1.4.2.

- 1 Cf. Rescher 1973 pp. 169 ff. (173).
- 2 Cf., e.g., sections 7.1.3., 7.1.5., 7.1.6. and 7.2.2. infra passim. Cf. Lehrer 1974 p. 164: T_1 "explains" T_2 . Cf. Brown 1979 p. 167.
- 3 Cf. Laudan 1977 pp. 54 and 230 note 9: "reinforcement" and "analogy".

4.1.4.3.

- 1 Cf. Ewing 1934 pp. 229-230. Cf. Blanshard 1939 p. 264. Cf. Rescher 1973 passim.
- 2 Cf. Rescher ibid. pp. 72 ff. (88 ff.)
- 3 Cf. Batens 1973 p. 402.
- 4 Cf. Laudan 1977 pp. 61 ff.
- 5 In the law, vague principles make precise rules coherent with each other, cf. MacCormick 1978 pp. 106 ff.

4.2.1.

- 1 One can say the same about Alexy's rules of rational legal discourse (1978 pp. 274 ff.). In this work, I have, however, no possibility to comment this part of his theory. See Peczenik 1983 section 4.6.3.

4.2.2.2.

- 1 Cf. MacCormick 1978 pp. 106 ff.

4.3.

- 1 Cf. Alexy 1978 pp. 221-233.
- 2 Popper 1972 p. 71.
- 3 Cf., e.g., Lorenz 1973 Ch. IV. Cf. Skinner 1974 (cf. Hesslow 1980 pp. 121 ff.). Cf., e.g., Barash 1977, Eibl-Eibesfeldt 1975, Gehlen 1975 Gordon 1978, Greenwood and Stini 1977, Van den Berghe 1975, Williams 1966, Wilson 1975. Cf. Petryszak 1980 pp. 1ff.
- 4 Cf., e.g., Lorenz 1973 Chs. V and VII.
- 5 Cf. Chomsky 1970 and 1967 pp. 87 ff. Cf. 1967 p. 83. But "(w)hat must be 'innate' are... learning strategies", not grammar, Putnam 1967 p. 100. Cf. Goodman 1967 p. 107. Cf. Katz 1966 p. 269. Cf. Kenny 1975 p. 184: "Wittgenstein did not mean to rule out the possibility of innate knowledge."
- 6 Cf. Kekes 1973 p. 288 on "problems of life", physiologically determined and independent of beliefs.
- 7 Kutschera 1972 vol. 2 pp. 391 ff.
- 8 Cf. Hempel 1963 (1958) p. 49. on the paradox of theorizing. Cf. Gärdenfors 1980 pp. 78 ff.
- 9 On other uncontroversial points see section 7.1.2. supra and Kutschera 1972 vol. 2 pp. 391 ff.
- 10 Cf. Popper 1972 pp. 29-30.
- 11 Cf. Black 1977:2 p. 56.
- 12 White 1970 p. 102.
- 13 Black 1977:2 p. 57.
- 14 This is the sense of "truth". The non-classical theories of truth (coherence, consensus, etc.) give mere criteria of truth, not the concept of truth. Cf. White 1970 p. 122.
- 15 Cf. Alexy 1978 pp. 165 ff. and 264 ff. ("Anspruch auf Richtigkeit"). Cf. Castañeda 1975 pp. 303-304: "The agent, then, has a pervasive deep formal inclination to solve his conflicts of oughts in terms of his mostly unknown motivational hierarchy. This formal inclination appears to his consciousness as his overriding ought... Thus the overriding ought... is a fundamental feature of reason."
- 16 I thus disagree with radical non-cognitivists who apparently reject the idea of practical rightness, cf., e.g., Ayer 1946 p. 113: "ethical concepts are pseudo-concepts"; Hägerström 1929 p. 120: the value statements are statements about a nothing; Stevenson 1944 p. 21: "'This is wrong' means I disapprove of this; do so as well." Cf. Russell 1935 Chapter IX (cf. Stevenson ibid. p. 265 note 17.)

4.5.

- 1 Cf. Kant 1781 (7) A 22 ff., B 37 ff.; A 30 ff., B 46 ff. Cf. Kemp 1968 pp. 16 ff.
- 2 Cf. Popper 1972 p. 135; Hansson 1980 pp. 12 ff.; Hesslow 1980 p. 128, etc.
- 3 Cf. Patzig 1976 pp. 32 ff. and Trigg 1973 pp. 164-165. Whorf 1956 pp. 214 ff. supports a different opinion.
- 4 "We are indeed given certain things in sensation, but it is not given that this object before us is a table, and that a dog; before we can know this our understanding must have formed the concept of table and dog". (Kemp 1968 p. 24). Cf. Quine 1953 p. 44: "Physical objects are... irreducible posits comparable, epistemologically, to the gods of Homer."
- 5 Cf. Kant 1781 (7) A 80, B 106. Cf. Kemp 1968 p. 20 ff. Kant thus assumed dichotomy between reality as it is (noumenon, thing as it is, Ding an sich) and appearance (phenomenon, thing as it appears to us, Anschauung). We can know only the second, not the first; cf. Kant 1781 (7) A 42, B 59. A problem: What Kant "says about the unknowable (the noumena) must either be sayable or unsayable: if it is sayable it transgresses the very limits it sets, while if it is unsayable...!", Gill 1974 p. 288. Cf. Strawson 1966 p. 12). In my opinion, however, Kant is right: he did not attempt to describe the noumena, he merely said that they are there. The first is "unsayable" but the second is "sayable".
The list of categories is controversial, cf., e.g., Strawson 1966 pp. 79 and 266 ff., and Werner 1978 pp. 145 ff. and 1979 pp. 37 ff.
- 6 Cf. Kant 1781 (7) A 189, B 232. Cf. Kemp 1968 p. 35. See also Lenzen 1954 pp. 21 ff.; Painlevé 1922; Keynes 1921 p. 264; Burks 1977 pp. 608 ff. and 639 ff.; Ph. Frank 1957 pp. 278 ff. and 1932 pp. 242 ff.; Peczenik 1979 pp. 354 ff.
- 7 Cf. Kant 1788 pp. 44 ff. (Engl. transl. pp. 45 ff.).

Ch. 5 heading

- 1 Cf. some remarks in Peczenik 1979:2 pp. 56 ff. (= Peczenik 1979:3, pp. 173 ff.); Peczenik 1979:4 section 3.5., and Peczenik 1979:5 pp. 17 ff.

5.1.1.

- 1 Cf., e.g., McCormick 1978 pp. 265 ff. and 271.
- 2 Max Black's remark in an unpublished manuscript.

5.1.2.

- 1 Cf., e.g., Chisholm 1957 and 1966, Armstrong 1973, and Pollock 1974 (quoted from Kekes 1979 pp. 405 ff.)
- 2 Chisholm 1966 pp. 21 ff.
- 3 Kekes 1979 p. 407.
- 4 Coherentism is defended among others by Quine 1953 and 1960, Sellars 1963, Lehrer 1974, Harman 1973, Rescher 1973 and 1977 and Winch 1958. Between foundationalism and coherentism there are intermediate positions, described by Cornman 1977 and Bonjour 1978. Classification by Kekes 1979 p. 405 ff.

5 Kekes 1979 p. 406 (reporting the foundationalists' views).

5.1.3. title

1 My interest in Wittgenstein originated from necessity to take position as regards Aarnio's views (1977 passim and 1979 passim), based upon Wittgenstein's philosophy.

5.1.3.1.

- 1 He has discussed Moore's examples, such as "here is one hand and here is another", cf. Moore 1925 and 1939. Cf. Wittgenstein 1969 No. 1 ff. Cf. Kenny 1975 pp. 203 ff.
- 2 Cf. Wittgenstein 1969 No. 115.
- 3 Cf. ibid. No. 122 and 217. Cf. Aarnio 1977 pp. 100 ff.
- 4 Wittgenstein 1969 No. 114.
- 5 Cf. ibid. No. 231: "If someone doubted whether the earth had existed a hundred years ago, I should not understand, for this reason: I would not know what such a person would still allow to be counted as evidence and what not." Cf. Wittgenstein 1953 No. 481. A problem: One can use this remark as a reason against all kinds of metaphysical doubt, for instance, against Kant's view that we do not know the things in themselves but only appearances. But one can confront even this kind of certainty with the question "why?". Under some interpretations, the question "why?" does not presuppose doubt, only curiosity. A Kantian would, for instance, say that all human beliefs are dependent upon the human condition, and for that reason knowledge of the "things in themselves" (noumena, das Ding an sich) is impossible. Does the Kantian doubt certainty? Not in the sense implying that any belief can be stronger justified than this certainty. Only in the sense that not even the strongest justification is enough to fulfill some of the expectations that concepts such as "certainty", "knowledge" and "truth" impose on us, see infra section 5.1.8. In this sense, certainty is open to a special metaphysical curiosity, concerned with human knowledge as a whole. Cf. Vesey 1963: The justification which the philosopher searches for in this instance is not what we ordinarily understand by justification. Re criteria of "rationality of a metaphysical theory", cf. Kekes 1973:2.
- 6 Wittgenstein 1969 No. 115. Cf. No. 124, 253 and 401. Cf. Aarnio 1977 pp. 100 ff.
- 7 Wittgenstein 1969 No. 144. Cf. No. 136.
- 8 Ibid. No. 307.
- 9 Cf. Malcolm 1963 pp. 62 ff.; Hintikka 1962 pp. 103 ff. re "knowing that one knows".
- 10 Wittgenstein 1969 No. 2. Cf. No. 154.
- 11 Ibid. No. 410. Cf. No. 144, 152 and 225.
- 12 Ibid. No. 142.
- 13 Ibid. No. 232.
- 14 See also Aarnio 1979:3 pp. 29 ff.

5.1.3.2.

- 1 Wittgenstein 1969 No. 204.
- 2 Cf. ibid. No. 344.
- 3 Wittgenstein 1953 No. 7 in fine.
"A language game is a deliberately simplified linguistic model, which reveals the manner in which language in a certain situation functions", Aarnio 1977 p. 47. Cf. Wittgenstein 1953 No. 23: "multiplicity of language-games ..., giving orders..., describing..., reporting..., speculating about an event, forming and testing a hypothesis..., play-acting, singing catches..., making a joke", etc. Language-games "are related to one another" (ibid. No. 65), "form a family" (ibid. No. 67). Cf. ibid. No. 66: "a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail."
Cf. Wittgenstein 1958 pp. 17 ff.
- 4 Stegmüller 1976 pp. 170 ff., has compared one element of a paradigm, that is the set of the intended applications of the theory, cf. infra section 7.2.3., to a set of language-games showing a family-resemblance. Cf. Phillips 1977 p. 90. A problem: can one simultaneously "straddle two paradigms just as someone can straddle two language-games?", ibid. pp. 112-113.
- 5 Wittgenstein 1953 No. 23; cf. No. 19 and 241, and pp. 174 and 226. Cf. Wittgenstein 1969 No. 204. The term "form of life" has been used, too, by Spranger 1950. Cf. Aarnio 1977 pp. 126 ff.
- 6 Wittgenstein 1969 No. 229. Cf. No. 476.
- 7 "(E)xperience cannot escape its being molded by language", Castañeda 1980 p. 36. Cf. Kmita in Eilstein and Przelecki 1966 p. 195. But language "cannot be the limit of one's experience", Castañeda ibid. p. 36, cf. p. 69. We "must admit that human beings have far more concepts (distinctive cognitive capacities) than words for expressing them - as the example of colors amply shows", Black 1962 p. 249. Finally, infants and animals have cognition but no language, cf. Churchland 1979 p. 137.
- 8 Wittgenstein 1969 No. 402, quoting Goethe, Faust I.
- 9 "(T)he world-picture, or more correctly speaking, the fragment of a world-picture forms the foundation for a (certain) language-game. It forms the pre-knowledge upon which we rest ourselves when playing our language-game." (Aarnio 1979:3 p. 34). Cf. von Wright 1972 sections 4-6 re "pre-propositional stage".
- 10 Wittgenstein 1969 No. 99. Cf. No. 256.
- 11 Action constitutes "the practical, non-propositional 'phase'" of the Weltanschauung, Aarnio 1979:3 p. 34.
- 12 Black 1978 p. 330; cf. Black 1980 passim.
- 13 Cf. Kelsen 1960 pp. 294 ff.
- 14 Cf. Brand p. IX, Translator's Introduction by R.E. Innis: "With its concentration on language-games and forms of life the Wittgensteinian operation attained its phenomenological character". Phenomenology "is supposed to begin from a scrupulous inspection of one's own consciousness", Dictionary of Philosophy p. 247; cf. Husserl 1913 Ch. 1 §§ 9 and 10: bedeutungsverleihende Akte, Bedeutungsintentionen, bedeutungserfüllende Akte, Vorstellungsobjekte, viewed from a non-psychological point of view; cf. Frege 1892 p. 32. Cf. Austin's (1963 pp. 94 ff.) distinction between locutionary and illocutionary acts, cf. Furberg 1971 pp. 113 ff. On Wittgenstein and Kant cf. Bachmeier 1978 and Rossvaer 1971.

- 14 Cf. Castañeda 1980 pp. 47 ff. and 52 ff., who also says that philosophy deals "with empirical data" (p. 30) and uses a method "structurally like scientific method" (p. 14; cf. Popper 1959 p. 15).

5.1.4.

- 1 Cf. Castañeda 1980 passim, e.g., pp. 14, 19, 36 and 133 on "one's world", "one's ontology", etc.

5.1.5.

- 1 Cf. Eckhoff and Sundby 1976 pp. 13 ff. and 218 ff.: "normative feedback". See also section 3.3.4. supra on reflective equilibrium.
- 2 Cf. Aarnio 1979 pp. 153-154.
- 3 Cf. section 7.1.3. infra.
- 4 Cf. Castañeda 1980 pp. 52, 113, 116 and 119 on "embedment".
- 5 On the other hand, methodology, language, philosophy and action continually change under influence of data and theories; cf. Alexy 1979 pp. 131 ff. Cf. Castañeda 1980 p. 55.
- 6 Rescher 1977 pp. 12 ff.
- 7 Ibid. pp. 88-90.
- 8 Ibid. p. 107. Moreover, the "theoretical aspect of coherence plays a central methodological role throughout this cyclic process", ibid. p. 102. See also p. 100.

5.1.6.

- 1 Popper 1970 p. 56.

5.1.7.

- 1 Wittgenstein 1953 No. 258 has criticized the very idea of a private language, which would have "no criterion of correctness". But cf. Castañeda 1980 p. 42.
- 2 "'We are quite sure of it' does not mean just that every single person is certain of it, but that we belong to a community which is bound together by science and education." (Wittgenstein 1969 No. 298.)
- 3 The above conclusions, established through conceptual analysis (internal perspective), have empirical counterparts (external perspective). Lorenz has argued that the highly organized social life of pre-human primates was a necessary precondition to the appearance of conceptual thinking, language, and cumulative tradition. These in turn influenced the social order and thus created culture. Lorenz 1973 Ch. III 3.
- 4 Cf. Habermas 1973 passim; cf. Alexy 1978 pp. 134 ff.
- 5 Cf. Aarnio 1981 p. 48; Tranøy 1979 p. 4 and 1980:2 p. 14.
- 6 Cf. Aarnio 1977 p. 131. Cf. section 5.2.7. infra.
- 7 Cf. Tranøy 1980:2 p. 14; Aarnio 1981 pp. 49 ff.
- 8 Cf. Tranøy 1980:2 p. 15.
- 9 Cf. Tranøy 1980:2 pp. 19, 25 and passim. Cf. Tranøy 1980 pp. 191 ff.

- 10 Aarnio 1981 p. 49 assumes a "social" point of view: "Consensus is a historical and social matter, it is a matter of the development of our forms of life."
- 11 Concerning the ways of life as wholes "comparison is if anything, a private one... reason as one may, the final decision is personal." Toulmin 1950 p. 153. Cf. Winch 1958 p. 100.
- 12 Cf. section 7.3.2. note 1 infra. Cf. Aarnio, in Aarnio, Alexy and Peczenik 1981 pp. 437 ff. and Aarnio 1979 pp. 157 ff.
- 13 Wittgenstein 1969 No. 611. Cf. No. 105. Cf. Trigg 1973 p. 94 and Hare 1955.
- 14 Cf. Aarnio 1979:3 pp. 34-35. Cf. Alexy 1979 pp. 129 ff.
- 15 Alexy 1979 pp. 125 ff. has distinguished five versions of the framework thesis. This is perhaps a sixth version.
- 16 Winch 1958 pp. 41, 52-53 and 100 ff. has distinguished such "forms of life" as science, art, history, religion, life of a monk, life of an anarchist. I would call them "aspects" of the form of life. Cf. Alexy 1979 p. 125. Cf. Aarnio in Aarnio, Alexy and Peczenik 1981 p. 443.

5.1.8.

- 1 Castañeda 1980 p. 19. Cf. 1.4.4.1. supra notes 5,6 and 7 ("ontological relativity").

5.2.1.

- 1 Cf. Chapters 1 and 2 supra passim.
- 2 Cf. section 3.3.1. supra.
- 3 Cf., e.g., section 2.3.10. supra passim.
- 4 Cf. section 5.1.8. supra.
- 5 Cf. sections 1.4.2. - 1.4.4. supra.
- 6 Cf. section 2.3.3. supra.
- 7 Cf. section 5.1.8. supra. Cf. Zirk-Sadowski 1979 p. 21: pluralism of morals.

5.2.2.

- 1 Cf. sections 3.2.1. and 3.2.2. supra.
- 2 Cf. sections 2.2.1.2. - 2.2.6. supra.
- 3 Cf. sections 1.4.9. and 1.3.5. supra.
- 4 Cf. section 2.2.1.1. supra.
- 5 Cf. sections 2.3.6. - 2.3.10. passim.
- 6 Cf. Peczenik 1972 pp. 222 ff. and section 1.3.5. supra.
- 7 Cf. sections 1.4.8. - 1.4.9. supra.
- 8 Cf. sections 1.4.10., 3.3.1. and 4.2.2. supra. Cf. Lachmayer 1981 p. 277: "Das Naturrecht ist jener Grenzbereich, welcher Ideologie und Recht verbindet. Werden die Naturrechtsvorstellungen zerstört..., dann wird... das Recht... bewusstseinsmässig isoliert".

- 9 Cf. Aarnio 1981 pp. 33 ff. Cf. Strömholm 1981 pp. 420 ff. and 1974 passim on "criteria of relevance".
- 10 Cf. Aarnio in Aarnio, Alexy and Peczenik 1981 p. 440 and Popper 1979 pp. 23 ff.
- 11 It thus contains a part of the value system of society, cf. Jørgensen 1970 p. 114; Peczenik 1971:2 pp. 34 ff. and 1974 p. 194. By the way, even the famous "value-nihilist" Axel Hägerström admitted the idea of value-systems, cf. Marc-Wogau 1968 p. 119.

5.2.3.

- 1 Cf. Westerberg 1953 passim (an example)
- 2 Cf. section 5.1.7. supra on acceptability.

5.2.4.

- 1 Cf., e.g., McCormick 1978 p. 245. Cf. sec. 1.4.3.n.12 supra. Cf. McCormick 1981 p. 119: "But since the process of development and redefinition is an historical one, it does not involve a vicious circularity after all." Cf. sec. 3.3.4., 3.3.5., 5.1.5. and 2.3.6.1. n. 4 supra.

5.2.5.

- 1 Cf. Peczenik 1974 p. 194.
- 2 On all these doctrines cf. Wróblewski 1959 passim.
- 3 Ibid. pp. 151 ff.
- 4 Cf. Ross 1958 pp. 141 ff. Cf. Schmidt 1972 pp. 571 ff.: "open" and "bound" legal arguments. Cf. Honoré 1973 pp. 219 ff.
- 5 Cf. section 7.3.4. infra.
- 6 Cf. section 7.3.3. infra.
- 7 Cf. section 7.3.5. infra.
- 8 Cf. Wróblewski 1972 pp. 371 ff.

5.2.6.

- 1 Cf. section 1.2.3. supra note 10.
- 2 Cf. Dworkin 1977 p. 40.
- 3 Cf. ibid. p. 22. Cf. Pound 1954 p. 56, cf. Dworkin 1977 p. 38.
- 4 Ibid. p. 340.
- 5 Ibid. p. 342.
- 6 Ibid. p. 17.
- 7 Ibid. p. 32.
- 8 Ibid. p. 87.
- 9 Cf. ibid. pp. 82-90; cf. pp. 31-35 and 68-71.
- 10 Ibid. p. 90.
- 11 Ibid. pp. 96-97.

- 12 Ibid. p. 297.
- 13 Ibid. pp. 81, 272-290, especially 286-287.
- 14 Ibid. p. 161.
- 15 Cf. ibid. p. 87.
- 16 Dworkin's thesis explicated by MacCormick 1978:2, p. 593. Cf. Dworkin 1977 pp. 105 ff.
- 17 Cf. Mackie 1977:2 p. 4. Cf. Dworkin 1977 pp. 105-123.
- 18 Ibid. p. 286.
- 19 Cf. section 4.3. supra.
- 20 Cf. MacCormick 1978 p. 255 and 1978:2 p. 596.
- 21 MacCormick 1978 pp. 252-253. Cf. MacCormick 1978:2 p. 588.
- 22 Mackie 1977:2 p. 9. Cf. Farago 1980 pp. 195 ff.
- 23 Cf. R. Hilpinen, Normative Conflicts and Legal Reasoning, unpublished manuscript.
- 24 A remark made by Aulis Aarnio.
- 25 Dworkin 1977 p. 282.
- 26 Mackie 1977:2 p. 7.

5.2.7.

- 1 Cf. Aarnio 1977 p. 94, 1978 p. 162 and 1979 p. 113. Cf. Aarnio 1979:3 pp. 25 ff. and 35 ff.
- 2 Cf. Aarnio in Aarnio, Alexy and Peczenik 1981 p. 444. Cf. Aarnio 1981 pp. 49 ff.

6.1.

- 1 Transpersonal values sensu largo. Sub-classes: collective values (Kollektivwerte) and achievement values (Werkwerte), cf. Radbruch 1950 pp. 147 ff. Concerning optimalization, cf. section 4.1.5. supra.
- 2 Cf. von Wright 1963:2 passim.
- 3 Heather 1981 pp. 469 ff.
- 4 Cf. Castañeda 1975 p. 303: "mostly unknown motivational hierarchy".

6.2.

- 1 One, not supreme. Cf. Tammelo 1971 pp. 51 and 57-58; 1980 p. 35 and 1977 pp. 134-135. Cf. Feinberg 1975 p. 116 and Nowell-Smith 1973 pp. 320 ff. A contrary opinion, cf. Rawls 1973 p. 3. Cf. supra 3.3.1. note 9.
- 2 Cf. Tay 1979 p. 96: "balancing of concerns". Cf. Jareborg 1980 p. 39: compromises concerning the choice of the point of view and the choice of criteria. Justice = suum cuique (Cf. Tammelo 1971 p. 95) sensu largo, cf. note 24 infra. Concerning optimalization cf. section 4.1.5. supra.
- 3 Cf., e.g., Perelman 1963 p. 16.
- 4 Cf. Peczenik 1974 p. 178 and 183 ff.

- 5 Cf. Tammelo 1977 pp. 9, 39 and 54. Cf. Radbruch 1950 p. 126: the commutative justice presupposes equality.
- 6 Cf. Eckhoff 1971 pp. 38 ff.
- 7 The optimal balance of considerations in the law of torts is, however, a complex matter, cf. Hellner 1976 pp. 13 ff. and 1972 pp. 304 ff.
- 8 Cf. Esser 1964:2 p. 99. Cf. Peczenik 1971:2 pp. 20 ff.
- 9 Cf. Esser 1964:2 p. 99 note 43: "Ubi emolumentum ibi onus".
- 10 Cf. also von Wright 1963:2 pp. 207 ff.
- 11 Cf. Agge 1970 p. 49.
- 12 Cf. Perelman 1963 pp. 29 ff.: "equity"; p. 33: "pure compromise". Cf. Friedrich 1963 p. 43: "balanced evaluation... on the ground of values prevalent in the political community concerned". Cf. Perelman 1980 p. 81 and 1980:2 p. 133: "consensus". Cf. McKeon 1963 p. 61: "the multiplicity and interplay of kinds of equality is an instrumentality of progress".
- 13 Cf. Eckhoff 1971 pp. 46, 208 ff. Cf. Perelman 1963 pp. 6-7; Ross 1958 pp. 270-272; Rescher 1966 p. 73; Lucas 1980 pp. 164 ff.
- 14 Cf. Weinberger 1978 p. 208.
- 15 See also de Cervera 1977 p. 240: Every "equalizing drive consolidates and fortifies the group to which the drive is circumscribed, thus postulating a better hierarchical position for the group."
- 16 Cf. Peczenik 1971:2 p. 21; Peczenik 1972:2 pp. 523-524; Peczenik 1974 p. 181. Cf. Welinder 1974 pp. 86-87 on Adolph Wagner (Verein für Sozialpolitik) and F.Y. Edgeworth (1845-1926) and A.C. Pigou (1877-1951).
- 17 Rawls 1973 p. 302.
- 18 Cf., e.g., Rescher 1966 p. 29: "a 'principle of catastrophe-prevention' stipulating a minimal utility floor for all individuals below which no one should be pressed." Cf. Stone 1979 p. 112.
- 19 Rawls 1973 p. 302.
- 20 Cf. Rawls 1973 p. 20: "By going back and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments and conforming them to principle, I assume that eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted." Cf. Rawls 1980 p. 515: "the Kantian roots of that conception". But cf. Tugendhat 1979 pp. 88-89: "Suppose somebody says: 'In the original position I would opt for a social system ruled by the principle of utility, because this would maximize my chances; but morally I reject such a system as unjust.' According to Rawls it would be self-contradictory to say such a thing, but it does not appear to be self-contradictory and may even be true." Cf. Hare 1973 p. 249; Browne 1976 p. 1; Höffe 1977 p. 423.
- 21 Cf. Jørgensen 1973 pp. 256. Cf. Pettit 1974 pp. 311 ff. Cf. Wolff 1977 p. 195. Cf. Weinberger 1977:3 pp. 234 ff.
- 22 Cf. Weinberger *ibid* and 1978 p. 208. Cf. Wolff 1977 p. 210. Cf. Nozick 1974 p. 198: "If things fell from heaven like manna, ... then it is plausible to claim that persons... would agree to" Rawls. Cf. Lucas 1980 p. 67: "whereas Rawls is concerned only with the underdog, justice is concerned with everybody and seeks to maximise not only the minimum pay-off but every pay-off; that is to say, a just distribution would be one in which nobody was getting less than they should, that is, less than

- he otherwise would were it not for good reason." Cf. Passmore 1979 p. 26: "the more competent always ought to be preferred to the less competent".
- 23 M3 is also related to iustitia commutativa, cf. note 5 supra.
- 24 Suum cuique sensu stricto (cf. note 2 supra on suum cuique sensu largo). Cf. Ulpianus, Dig. I.I.10, pr.: "Iustitia est constans et perpetua voluntas ius suum cuique tribuendi."
- 25 Nozick 1974 p. 151.
- 26 Cf. Steiner 1977 p. 151: "For we have a situation in which membership is continually changing, and yet we are required to treat each member as possessor of inviolable rights. What protection is to be afforded to the appropriate entitlements of individuals originating at a historically later moment than individuals who are members of the first generation?"
- 27 Cf. Heather 1981 pp. 469 ff. Cf. Henkel 1977 p. 417 and Waldstein 1980 p. 303: The principle of justice is an "offenes Prinzip mit normativem Richtliniengehalt". Cf. Weinberger 1978 p. 208.

6.3.1.

- 1 He also admits teleological justification via an ideal, Toulmin 1950 p.132.
- 2 Cf. Luhmann 1972 pp. 99 ff. and 1973:2 passim. Cf. Anuario 1974 passim. Cf. Olivecrona 1971 pp. 187 ff.; "different functions of the idea of a right" (p. 187).
- 3 Cf. Hempel 1968 p. 209. Cf. Merton 1957 pp. 19-84.
- 4 Petrażycki 1959 p. 104. Cf. Popper 1972 p. 70.

6.3.2.

- 1 Robert Alexy's classification.
- 2 Cf., e.g., Macklin 1977 p. 371.
- 3 The law is a part of culture, cf. Zirk-Sadowski 1977 pp. 29 ff.
- 4 Cf. E.L. Jones, The European Miracle, Cambridge 1981 pp. 225 ff. and passim.

7.1.1.

- 1 Cf. Aarnio 1978 p. 149.
- 2 This is a generalization of Alexy's rule J.10, cf. Alexy 1978 p. 325.
- 3 Cf., e.g., Petrażycki 1959-60 vol. 1 p. 312 and Strömholm 1976 pp. 103-104.
- 4 Cf. Dreier 1978 p. 106 and 110: "Grundbegriffstheorien" (= Dreier 1981 pp. 73 and 76-77.)
- 5 Cf. Peczenik 1979 pp. 6 ff. and 328 ff.
- 6 Cf. Apostel 1961 pp. 1 ff., Model 1961 passim and Black 1962 passim. Cf. Peczenik 1966 pp. 16 ff. and 122 ff.
- 7 Cf. Black 1977 pp. 456 and 1979 p. 143.
- 8 Cf. Baumgarten 1939 p. 54.
- 9 Dreier 1978 pp. 106 ff. (= 1981 pp. 73 ff.).

- 10 Cf. Kirchmann 1848.
- 11 Lundstedt 1932-1936 passim.
- 12 Cf. section 1.4.4.1. supra.

7.1.2.

- 1 "Not intersubjective" implies "probably not objective", cf. Hermerén 1972 pp. 125 ff.
- 2 "(A)sserting a universal connexion between properties", Braithwaite 1960 p. 9; cf. Mehlberg 1958 pp. 181 ff. Popper 1959 p. 433: "A statement may be said to be naturally or physically necessary if, and only if, it is deducible from a statement function which is satisfied in all worlds that differ from our world, if at all, only with respect to initial conditions". Cf. Føllesdal 1965 pp. 263 ff. and 1966 pp. 1 ff.; cf. Weinberger 1977 p. 39 and 1974:2 pp. 15 ff. (But cf. Stegmüller 1969 p. 451; Cf. Rescher 1969 p. 185: "Lawfulness is a matter of imputation: when an empirical generalization is designated as a law, this ... status is imputed to it.") Cf. Peczenik 1979 pp. 335 ff.
Laws of nature satisfy the principle of analogy: relevantly similar causes have similar effects, cf. Pap 1963 pp. 259 ff.
- 3 Cf. Leibniz 1902 section 6. Cf. Weyl 1949 p. 191, opposed by Schlick 1931; Frank 1932 pp. 1 ff.; Poincaré 1902.
- 4 But neither does the study of history, literary criticism, linguistics, geography, psychology, etc. Cf., e.g., Marc-Wogau 1967 p. 227 (an example). Cf. Fodor 1968 pp. 230-231. One must thus either assume that our knowledge of humanistic laws of nature is limited, cf. Hempel 1966 p. 107, or conclude that the idea of laws of nature is not entirely applicable to the humanities, cf. Popper 1960 pp. V ff. and 105 ff.; Popper 1966 vol. 1 pp. 7 ff. and vol. 2 pp. 81 ff., 259 ff. (Cf. also more radical views of von Wright 1971, iv, 7; Dray 1957, and Winch 1958). Cf. Peczenik 1979 pp. 330 and 349 ff.
- 5 Cf. Popper 1972 pp. 109, 166 and 242 ff., etc.
- 6 Cf. also Popper 1959 p. 13 (Preface to the first edition of 1934).
- 7 Cf. Popper 1972 p. 177.
- 8 Cf. Popper 1972 pp. 165 and 169.
- 9 Laudan 1977 pp. 66 ff.
- 10 Ibid. pp. 48 ff. and 53. Cf. Popper 1972 pp. 170 ff. and 1959 p. 15.
- 11 According to Kekes 1979 p. 418, there "are two equally important standards of justification: problem-solving and truth."

7.1.3.

- 1 Popper 1959 p. 423.
- 2 Hanson 1958 p. 24.
- 3 "(T)here is no neutral sense-datum language in which we can state what we saw before we added the interpretation", but the transformation from seeing "flashes" to seeing swans "marks the transition from one perceptual language-game to another", Phillips 1977 p. 103. Cf. section 1.1.1. note 2 supra.

- 4 Cf. Ajdukiewicz 1965 p. 222. Cf. Mehlberg 1958 p. 291: "whatever looks yellow to me probably is yellow".
- 5 Observational terms are observational relatively to a given theory, not absolutely, cf. Kutschera 1972 vol. I p. 258.
- 6 "The unit of empirical significance is the whole of science", Quine 1953 p. 42; cf. Quine 1960 pp. 40 ff.
- 7 Cf. Gärdenfors 1980 pp. 79 ff.; cf. Stegmüller 1976 pp. 40 ff., 45 ff., and 204 ff.
- 8 Cf. Hermerén 1973 pp. 73 ff. Cf. section 5.1.5. supra.
- 9 Aulis Aarnio's remark made in a discussion about the present work.
- 10 Cf. Peczenik 1966 pp. 26 ff.; Alchourrón and Bulygin 1971 p. 84.
- 11 Cf. Einstein 1953 p. 780: "individual emotional experiences".

7.1.4.

- 1 E.g., Victor 1977 pp. 210 ff., 215 ff. and 292.
- 2 Cf. Aarnio in Aarnio, Alexy and Peczenik 1981 pp. 430 ff.
- 3 Furthermore, it sounds strange to say that jurists "discover" sources of the law. The sources are usually published.

7.1.5.

- 1 An old theory, cf. notes 3 and 4 infra.
- 2 Cf. Mehlberg 1958 p. 190: "The validation of laws is necessarily inductive."
- 3 Cf. Mill 1886 Book 3 Ch. VIII; cf. Stebbing 1933 pp. 333 ff.; Carney and Scheer 1964 pp. 376 ff.; Mackie 1974 pp. 297 ff.; Hålldén 1973 pp. 74 ff.
- 4 Cf. e.g., v. Wright 1957 pp. 1 ff. and Katz 1962 passim. But if order rules the universe, induction is the only method of foreseeing the order, cf. Reichenbach 1940 pp. 97 ff.; Feigl 1962 pp. 29 and 31. Induction is sufficient to reconstruct all scientific reasonings (Reichenbach 1949 pp. 429 ff.) and is involved in statistical reasonings (cf. Hempel 1962 pp. 133 ff.). See also section 7.1.6. note 6 infra.
- 5 Cf. Mehlberg 1958 pp. 90 ff.
- 6 Cf. section 2.3.9.2. supra.
- 7 Cf. Peczenik 1966 pp. 50-72; Peczenik 1967 pp. 135-138 (= 1969:2 pp. 33-36); Peczenik 1969 pp. 43-45 (= Peczenik 1969:2 pp. 56-57).
- 8 Cf., e.g., Braithwaite 1960 p. 259.
- 9 Cf. note 7 supra. Cf. sections 4.1.3. and 6.2. supra.

7.1.6.

- 1 Proper in the context of justification; justification answers Kant's question quid iuris? and consists in a logical examination of ideas, cf. Popper 1959 p. 31.
- 2 Ibid. pp. 40 ff. Cf. Giedymin 1959 pp. 7 ff.
- 3 Cf. Popper 1959 pp. 28 ff. and 78 ff. re criticism of inductionism and "conventionalism".

- 4 Cf. Popper 1959 p. 108 and 1972 p. 261.
- 5 Cf. Watkins 1978 p. 354.
- 6 Cf., e.g., Newton-Smith 1981 p. 70: "For Popper the goal of science is increasing verisimilitude". But "he needs an inductive argument to establish the conclusion that modern science has (by and large) more verisimilitude than previous science, and a second inductive argument to correlate corroboration and verisimilitude." Cf. *ibid.* pp. 195-196. Cf. Reichenbach 1951 Ch. 14, Kotarbińska 1962, Mehlberg 1958 p. 231 and note 10, etc.
- 7 Koertge 1978 p. 255; I inserted the word "observation" instead of "experiment".
- 8 Cf. Popper 1959 p. 83. Agassi 1975 accepts *ad hoc*-hypotheses, falsifiable in principle (albeit so far not corroborated), on condition that one all the time tries to falsify them; cf. Nordin 1980 pp. 113 ff.
- 9 The norms of legal reasoning are perhaps more analogous to a broader list of "norms of inquiry", exceeding methodological rules. Tranøy has discussed an outline of such norms. They have not only methodological character, but express distinct traditions, each concentrated around a different value: the Platonic-Aristotelian value of self-realization, the Baconian value of public welfare, the Weberian value of value-neutrality, various methodological values, such as testability, intersubjective controllability, honesty, sincerity, exactitude, completeness, simplicity, order, coherence and system, and, finally, the idea of academic freedom. Cf. Tranøy 1976 pp. 131 ff., 1980:2 p. 28, and 1980 pp. 191 ff.

7.2.2.

- 1 Cf. Lakatos 1970 pp. 132 ff.; cf. Hansson 1980 p. 48. But see also Popper 1959 p. 13: "a structure of scientific doctrines is already in existence;... This is why (a scientist) may leave it to others to fit his contribution into the framework of scientific knowledge." Cf. Popper 1970 pp. 51 ff.
- 2 Cf. note 1 *supra*. See also Nowak 1977, 1971 and 1974.
- 3 Worall 1978 p. 61.
- 4 Cf. Feyerabend 1975 Ch. 16.
- 5 Cf. Worall 1978 p. 63. Concerning inductionist criticism of this methodology cf. Newton-Smith 1981 p. 99.
- 6 Cf. de Wild 1980 p. 55.
- 7 Cf. *ibid.* p. 58.
- 8 Cf. *ibid.* p. 61.
- 9 On the other hand, if we assumed that the legal "data" consists of the sources of the law, Lakatos's methodology would not work when the sources are incompatible, cf. sections 2.3.10.2. - 2.3.10.8. *supra*.
- 10 A problem for an epistemological instrumentalist (cf. section 4.3. *supra*): Scientific theories merely explain the data. Legal "theories" are, however, irreplaceable premises of legal justification. (Göran Hermerén's remark during a discussion about the present work.) Consequently, an instrumentalist cannot definitively say which components one should regard as legal "data" and which as legal "theories", cf. section 3.3.5. *supra*.

- 11 I thus disagree with some theses of de Wild, cf. 1980 p. 140 (that the legal scholar does not normatively regulate human conduct but merely explains the sources of the law) and pp. 130 ff. (that there is no relevant difference between the study of law and social science).

7.2.3.

- 1 Cf. Sneed 1971. Cf. Stegmüller 1976 pp. 40 ff., 106 ff. and 161 ff.
Cf. Gärdenfors 1980:2 pp. 93 ff.
- 2 Cf. Aarnio 1981:2 pp. 47 ff. and 53 ff., and 1979:2 passim.
- 3 Cf. Aarnio 1981:2 p. 56.

7.3.1.

- 1 Cf. Kuhn 1970 passim. Cf. Hansson 1980 p. 19.
- 2 Cf. Mårtensson 1980 p. 31. Cf. Kuhn 1977 pp. 293 ff.
- 3 Kuhn 1970 passim.
- 4 Kuhn 1970:2 p. 266. Incommensurable, as e.g. 1 and $\sqrt{2}$, but not incompatible, as e.g. 1 and $\sqrt{-1}$.
- 5 Kuhn 1970 pp. 109-110. Feyerabend 1975 passim has concluded that everything goes in science. Reactions to his famous work have, however, been mostly negative. Cf. Gellner 1975 and Kulka 1977; cf. Hansson 1980 pp. 51 ff.
- 6 Kuhn 1970 pp. 180-181.
- 7 Cf. Toulmin 1972 pp. 114 ff. Cf. Cohen 1973 p. 43.
- 8 Toulmin 1972 pp. 134-135.
- 9 Hesslow 1980 p. 126.
- 10 Tranøy 1980:2.
- 11 Newton-Smith 1981 p. 179.

7.3.2.

- 1 Aarnio 1981:2 pp. 51 ff. Not all juristic schools are "paradigms" but only those whose criteria of correctness are incommensurable.
- 2 Cf. Zuleta 1981 pp. 181 ff.
- 3 Cf. Ossowski 1962 pp. 159 ff. on the humanities.
- 4 Cf. Dalberg-Larsen 1977 pp. 513 ff. According to Jørgensen 1968 pp. 147 ff., the modern history of legal dogmatics can be divided into four phases: 1) a logical-mathematical period since 12 until 16 Century, 2) a physical-mechanical period until 19 Century, 3) a biological-chemical period until 20 Century, and 4) a relativistic period now.
- 5 Cf. Zuleta 1981:2 p. 354.

7.3.3.

- 1 Stone 1964 p. 100. See also, e.g., Kelsen 1916 pp. 37 ff.
- 2 Cf. Zuleta 1981 p. 155 and 1981:2 p. 352 item a).
- 3 Cf. Zuleta 1981 p. 156 and 1981:2 p. 352 item c): "legislative monism".

- 4 It gives legal science the possibility to affect legal relations, cf. Zuleta 1981 p. 156 item h).
- 5 Cf. Zuleta 1981 pp. 157-158.
- 6 Ibid. 156 and Zuleta 1981:2 p. 352 item d).
- 7 Cf. Zuleta 1981 p. 156 and 1981:2 p. 352 item e).
- 8 Hence, we have discussed these problems separately in Chapters 1 and 2. Cf. Zuleta 1981 p. 156 and 1981:2 p. 352 item f); see also Zuleta 1981 p. 156 item g): the distinction between interpretation and application of law.
- 9 Cf. Peczenik 1974 pp. 144 ff. with references.
- 10 It expected to scientifically determine the only correct solution of all legal cases, using as premises the sources of the law only. This expectation is not realistic because of vagueness of the ordinary language, cf. Evers 1970 pp. 45-46. Cf. section 5.2.6. supra.
- 11 Cf., e.g., Windscheid 1906.
- 12 Cf., e.g., Hagströmer 1889 pp. 437 ff. Cf. Puchta 1893, especially §§ 6, 10, 11, 15 and 33. Cf. Jhering 1916 p. 29: the concepts are productive, they mate and breed new ones.
- 13 Cf. Stone 1964 p. 225.
- 14 As a result, Conceptual Jurisprudence disregarded substantive reasons, cf., e.g., Strömholm 1981 p. 83.

7.3.4.

- 1 Cf. Jhering 1885 passim.
- 2 Cf. Dalberg-Larsen 1979 pp. 85 ff.: "The goal-oriented style in legal science around 1900", "the realistic schools from 1920 to 1940", "the 1960s and after". See also section 2.3.5. supra.
- 3 Cf. Summers 1981 pp. 882 ff. Cf. Dalberg-Larsen 1979 pp. 85 ff.
- 4 Cf. Jhering 1888 vol. III:1; cf. Larenz 1975 p. 49. Cf. Larenz 1975 p. 56 about Heck.
- 5 Ehrlich 1913 p. 1; Larenz 1975 p. 69.
- 6 Pound 1910 pp. 12 ff.
- 7 Ross 1958 pp. 44-45. Cf. section 1.4.4.2. supra.
- 8 Ross in Iuul, Ross and Trolle 1967 p. 91. I would rather say that we have the principle lex superior but that it is a prima facie principle, saying how to begin the legal argumentation, not how to finish it. Cf. section 2.3.10.7. supra.
- 9 Summers 1981 pp. 882 ff. Cf. Pound 1923 pp. 150-165: "social engineering".
- 10 Summers 1981 p. 867 note 4 item 9.
- 11 Cf. Rodhe 1972. Cf. examples in Rodhe 1956, Rodhe 1959 and Rodhe 1971.
- 12 Cf. Ross 1958 p. 334.
- 13 Cf. Lauridsen 1974 pp. 341 ff. and 1977 p. 160.
- 14 Cf. Lauridsen 1974 pp. 78-79 and 1977 p. 161.
- 15 Viehweg 1974 p. 95. Cf. Larenz 1975 p. 143.
- 16 Zuleta 1981:2 p. 355.

7.3.5.

- 1 Cf. Peczenik 1979 pp. 381-382 and 1979:4 passim. Cf. Wróblewski 1972 pp. 371 ff. on "ideology of legality", distinguished from bound and free decision-making. Cf. Krawietz 1979 pp. 151-152: "analytische Hermeneutik" and "rechtssoziologisch differenzierte Pragmatik". Cf. Strömholm 1976 pp. 103 ff.: analytical study of law and sociology of law.

ABBREVIATIONS

ÅB	<u>Ärvdabalken</u> , the Decedents' Estate Code (Sweden)
ABGB	<u>Allgemeines Bürgerliches Gesetzbuch</u> , the Civil Code (Austria)
ARSP	<u>Archiv für Rechts- und Sozialphilosophie</u>
BGB	<u>Bürgerliches Gesetzbuch</u> , the Civil Code (Germany)
BGE	<u>Entscheidungen des Schweizerischen Bundesgerichts</u> (Switzerland)
BGHZ	<u>Entscheidungen des Bundesgerichtshofs in Zivilsachen</u> (Federal Republic of Germany)
BrB	<u>Brottsbalken</u> , the Penal Code (Sweden)
Dig.	<u>Digesta</u> (Eastern Roman Empire, the major part of Emperor Justinianus's codification, 533)
HB	<u>Handelsbalken</u> , the Commercial Code (Sweden)
IVR	International Association for Philosophy of Law and Social Philosophy
JB	<u>Jordabalken</u> , the Real Property Code (Sweden)
JFT	<u>Tidskrift, utgiven av Juridiska Föreningen i Finland</u>
MBL	<u>Medbestämmandelagen</u> , the (Industrial) Co-determination Act (Sweden)
NJA	<u>Nytt Juridiskt Arkiv, avdelning I</u> (Sweden)
Prop.	Government Bill (Sweden)
Q.B.	Queen's Bench Reports (England)
RA	<u>Regeringsrättens årsbok</u> (Sweden)
RB	<u>Rättegångsbalken</u> , the Code of Judicial Procedure (Sweden)
RF	<u>Regeringsformen</u> , the Instrument of Government (Sweden)
RGZ	<u>Entscheidungen des Reichsgerichts in Zivilsachen</u> (Germany)
Rt	<u>Norsk retstidende</u> (Norway)
SN	<u>Orzeczenie Sądu Najwyższego</u> , Decision of the Supreme Court (Poland)
SOU	<u>Statens offentliga utredningar</u> (Sweden)
SSL	Scandinavian Studies of Law
SvJT	<u>Svensk juristtidning</u> (Sweden)
TfR	<u>Tidskrift for rettsvitenskap</u> (Norway)
UfR	<u>Ugestrift for Retsvaesen</u> (Denmark)
VersR	<u>Versicherungsrecht, Juristische Rundschau für die Individualversicherung</u> (Federal Republic of Germany)
Wiener...	Hans Klecatsky, René Marcic and Herbert Schambeck (edd.). <u>Die Wiener rechtstheoretische Schule, Schriften von Hans Kelsen, Adolf Merkel und Alfred Verdross</u> , Vienna - Frankfurt - Zürich - Salzburg - Munich 1968

BIBLIOGRAPHY

The items which are above cited by the author's name followed by the year (and number)

Aarbakke 1966: M. Aarbakke, Harmonisering av rettskilder, Tfr.

Aarnio 1983: A. Aarnio, Rational as Reasonable, Dordrecht (in press).

- 1981: On Truth and the Acceptability of Interpretative Propositions in Legal Dogmatics, Rechtstheorie Beiheft 2, Berlin.
- 1981:2: On the Paradigm Articulation in Legal Research, Rechtstheorie Beiheft 3, Berlin.
- 1979: Denkweisen der Rechtswissenschaft, Wien - New York.
- 1979:2: On the Paradigm of Legal Dogmatics, IVR World Congress, Paper No. 087.
- 1979:3: Linguistic Philosophy and Legal Theory, Rechtstheorie Beiheft 1, Berlin.
- 1978: Legal Point of View. Six Essays on Legal Philosophy, Helsinki.
- 1977: On Legal Reasoning, Turku.
- 1967: Perillisen oikeusasemasta (On The Legal Position of an Heir), Porvoo (mit deutscher Zusammenfassung).

Aarnio, Alexy and Peczenik 1981: A. Aarnio, R. Alexy and A. Peczenik, The Foundation of Legal Reasoning, 12 Rechtstheorie.

Adlerkreutz 1969: A. Adlerkreutz, Avtalsrätt I, 2 ed. Lund.

Adomeit 1979: K. Adomeit, Rechtstheorie für Studenten, Heidelberg-Hamburg.

Agassi 1975: J. Agassi, Science in Flux, Dordrecht - Boston.

Agge 1970: I. Agge, Straffrättens allmänna del I, Stockholm.

- 1969: Huvudpunkter av den allmänna rättsläran, Stockholm.

Ahlander 1950: B. Ahlander, Är juridiken en vetenskap?, Uppsala.

Ailinpieti 1980: F. Ailinpieti, Tio exempel på lagstiftning genom förarbeten, Lund (unpublished).

Ajdukiewicz 1965: K. Ajdukiewicz, Logika pragmatyczna, Warsaw.

- 1934: O stosowności czystej logiki do zagadnień filozoficznych, XXXVII Przegląd Filozoficzny, pp. 323-327. German translation: Über die Anwendbarkeit der reinen Logik auf philosophische Probleme, Actes du VIII Congrès International de Philosophie, Prague 1936. Reprinted in: Język i Poznanie, I, Warsaw 1960. Pages quoted from this reprint.

Alchourrón and Bulygin 1981: C.E. Alchourrón and E. Bulygin, The Expressive Conception of Norms, in: R. Hilpinen (ed.), New Studies in Deontic Logic, Dordrecht.

- 1971: Normative Systems, Wien - New York.

Alchourrón and Makinson 1983: C.E. Alchourrón and D. Makinson, On the Logic of Theory Change: Contraction Functions and Their Associated Revision Functions, Theoria (in press).

- 1981: Hierarchies of Regulations and Their Logic, in: R. Hilpinen (ed.), New Studies in Deontic Logic, Dordrecht.

- Alexy 1981: R. Alexy, Die Idee einer proceduralen Theorie der juristischen Argumentation, Rechtstheorie Beiheft 2.
- 1980: Die logische Analyse juristischer Entscheidungen, ARSP Beiheft Neue Folge 14.
 - 1979: Aarnio, Perelman und Wittgenstein. Einige Bemerkungen zu Aulis Aarnios Begriff der Rationalität der juristischen Argumentation, in: A. Peczenik and J. Uusitalo (edd.), Reasoning on Legal Reasoning, Vammala.
 - 1979:2: Zum Begriff des Rechtsprinzips, Rechtstheorie Beiheft 1, Berlin.
 - 1978: Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung, Frankfurt/M.
- Allen 1958: C.K. Allen, Law in the Making, 6 ed. Oxford.
- Anscombe 1973: G.E.M. Anscombe, Über den Ursprung der Autorität des Staates, 20 Ratio.
- 1958: On Brute Facts, 18 Analysis.
- Anuario 1974: Anuario de Filosofia del Derecho, Tomo XVII-1973-1974, Comunicaciones al IV Congreso Mundial de Filosofia Juridica y Social, Madrid.
- Apostel 1961: L. Apostel, Towards the Formal Study of Models in the Non-formal Sciences, in: Model 1961.
- Aqvist 1973:2: L. Aqvist, The Emotive Theory of Ethics in the Light of Recent Developments in Formal Semantics and Pragmatics, in: Modality, Morality and Other Problems of Sense and Nonsense, Essays Dedicated to Sören Halldén, Lund.
- Armstrong 1973: D. M. Armstrong, Belief, Truth and Knowledge, London.
- Austin 1963: J.L. Austin, How to Do Things with Words, Oxford.
- Austin 1832: J. Austin, Lectures on Jurisprudence, 1 ed.
- Ayer 1946: A.J. Ayer, Language, Truth and Logic, 2 ed., New York.
- Bachmaier 1978: P. Bachmeier, Kant und Wittgenstein, Frankfurt/M.
- Barash 1977: D. Barash, Sociobiology and Behaviour, New York.
- Barry 1973: B. Barry, The Liberal Theory of Justice, A Critical Examination of the Principal Doctrines in A Theory of Justice by John Rawls, Oxford.
- Basave 1977: A. Basave Fernandez del Valle, Do We Need An Idea of Natural Law?, ARSP Beiheft Neue Folge 11 (IVR X).
- Batens 1973: D. Batens, Nicholas Rescher's Coherence Theory of Truth, 19 Logique et Analyse.
- Baumgarten 1939: A. Baumgarten, Grundzüge der juristischen Methodenlehre, Bern.
- Beck 1965: L.W. Beck, Studies in the Philosophy of Kant, Indianapolis - New York - Kansas City.
- Beckman et. al. 1970: N. Beckman, C. Holmberg, B. Hult, I. Strahl et. al., Kommentar till Brottsbalken, I, 3 ed, Stockholm.
- Beckman 1962: N. Beckman, Lagtillämpning och prejudikat, Tidskrift för Sveriges Advokatsamfund.
- Bengtsson 1976: B. Bengtsson, Skadestånd vid myndighetsutövning I, Stockholm.
- 1972: Om ansvar för fel i domstolsverksamhet enligt skadeståndslagen in: Festschrift till Ekelöf.

- Bengtsson 1969: Om äktenskapsliknande samliv, in: Festskrift till Arnholm, Oslo.
- Bentham 1970: J. Bentham, *Of Laws In General*, ed. H.L.A. Hart, London.
- Bergbohm 1892: K. Bergbohm, *Jurisprudenz und Rechtsphilosophie*, I:1, Leipzig 1892.
- Bergström 1980: L. Bergström, *Värdenihilism och argumentation i värdefrågor*, 1 Filosofisk tidskrift.
- Bernitz 1976: U. Bernitz, *Bättre rättskällor. Reflexioner över lagboken, rättsfallssamlingarna, betänkandena och departementpromemoriorna*, SvJT.
- 1970: *Rättsbildning genom praxis kontra lagstiftning som medel för rättsutveckling* (unpublished).
- Betti 1954: E. Betti, *Zur Grundlegung einer allgemeinen Auslegungslehre*, Tübingen.
- Bhaskar 1979: R. Bhaskar, *The Possibility of Naturalism*, Sussex.
- Bierling 1894: E.R. Bierling, *Juristische Prinzipienlehre* (new impression, Aalen 1961).
- Bjarup 1981: J. Bjarup, *Normers gyldighed og gældende ret*, UfR (B).
- 1980: *Reason and Passion. A Basic Theme in Hägerström's Legal Philosophy*, 11 Rechtstheorie.
 - 1978: *Skandinavisk Realismus*, München.
- Black 1980: M. Black, *Language-games with "Language-game"*, Dialectica.
- 1979: *How Metaphors Work: A Reply to Donald Davidson*, 6 Critical Inquiry.
 - 1978: *Lebensform and Sprachspiel in Wittgenstein's Later Work*, in: *Wittgenstein and his Impact on contemporary Thought*, Proceedings of the 2nd International Wittgenstein Symposium, Wien.
 - 1977: *More About Metaphors*, 31 Dialectica.
 - 1977:2: *The Objectivity of Science*, Bulletin of the Atomic Scientists, Feb. 1977.
 - 1977:3: *Some Remarks About Rationality*, 2 Philosophic Exchange.
 - 1962: *Models and Metaphors*, Ithaca-New York.
 - 1937: *Vagueness: An Exercise in Logical Analysis*, 4 Philosophy of Science.
- V. Black 1980: V. Black's report for II International Congress of Legal Science, Amsterdam September 1980.
- Blanshard 1939: B. Blanshard, *The Nature of Thought*, London.
- Bobbio 1969: N. Bobbio, *The Promotion of Action in the Modern State*, in: G. Hughes, ed., *Reason, Law and Justice*, New York.
- 1965: *Law and Force*, 49 The Monist.
- Bodenheimer 1969: E. Bodenheimer, *A Neglected Theory of Legal Reasoning*, 21 Journal of Legal Education.
- Bogdan 1978: M. Bogdan, *Komparativ rätt*, Lund.
- Bolding 1969: P.O. Bolding, *Reliance On Authorities or Open Debate? Two Models of Legal Argumentation*, 13 SSL.
- 1968: *Juridik och samhällsdebatt*, Stockholm.

- Bollnow 1936: O. Bollnow, *Dilthey: Eine Einführung in seine Philosophie*, Leipzig and Berlin.
- Bonjour 1978: L. Bonjour, *Can Empirical Knowledge Have a Foundation?*, 15 American Philosophical Quarterly.
- Braithwaite 1960: R.B. Braithwaite, *Scientific Explanation*, New York.
- Brand 1979: G. Brand, *The Central Texts of Wittgenstein*, Oxford.
- Brodbeck 1968: M. Brodbeck (ed.), *Readings in the Philosophy of Social Sciences*, New York.
- Brown 1979: H.I. Brown, *Perception, Theory and Commitment. The New Philosophy of Science*, Chicago - London, Phoenix paperback.
- Browne 1976: D.E. Browne, *The Contract Theory of Justice*, 5 Philosophical Papers.
- Burks 1977: A.W. Burks, *Chance, Cause, Reason*, Chicago.
- Carnap 1956: R. Carnap, *Meaning and Necessity*, Chicago, quoted from new impression 1960.
- Carney and Scheer 1964: J.D. Carney and R.K. Scheer, *Fundamentals of Logic*, New York - London.
- Castañeda 1980: H.-N. Castañeda, *On Philosophical Method*, *Nous Publications No. 1*, Indiana University.
- 1975: *Thinking and Doing*, Dordrecht.
 - 1974: *The Structure of Morality*, Springfield.
 - 1973: *On the Conceptual Autonomy of Morality*, VII Nous.
- de Cervera 1977: A. de Cervera, *The Paradoxes of Equality*, in: G. Dorsay, ed., *Equality and Freedom*, New York - Leiden.
- Cherniak 1981: C. Cherniak, *Minimal Rationality*, XC No. 358 Mind.
- Chisholm 1966: R.M. Chisholm, *Theory of Knowledge*, Englewood Cliffs.
- 1957: *Perceiving*, Ithaca.
- Chomsky 1970: N. Chomsky, *Sprache und Geist*, Frankfurt/M.
- 1967: *Recent Contributions to the Theory of Innate Ideas*, in: R.S. Cohen and M.W. Wartofsky, edd., *Boston Studies in the Philosophy of Science Vol. 3*.
- Churchland 1979: P.M. Churchland, *Scientific Realism and the Plasticity of Mind*, Cambridge.
- Cohen 1973: L.J. Cohen, *Is the Progress of Science Evolutionary?* *Review of Toulmin 1972*, 24 British Journal for the Philosophy of Science.
- Cohen 1964: M.R. Cohen, *Reason and Nature*, New York.
- Coing 1959: H. Coing, *Die juristische Auslegungsmethoden und die Lehren der allgemeinen Hermeneutik*, Köln - Oppladen.
- Conte 1981: A.G. Conte, *Konstitutive Regeln und Deontik*, in: E. Morscher and R. Stranzinger (edd.), *Ethik, Grundlagen, Probleme und Anwendungen. Akten des 5. Internationalen Wittgenstein-Symposiums, Kirchberg am Wechsel, 1980*. Wien.
- 1981:2: *Variationen über Wittgensteins Regelbegriff*, in: R. Haller (ed.), *Sprache und Erkenntnis als soziale Tatsache*, Wien.
 - 1974: *Validità*, XX Novissimo digesto italiano.

- Cornides 1976: T. Cornides, Jeremy Bentham's Theorie von der Struktur der Rechtsordnung, 7 Rechtstheorie.
- Cornman 1977: I.W. Cornman, Foundational versus Nonfoundational Theories of Empirical Justification, 14 American Philosophical Quarterly.
- Cossio 1964: C. Cossio, La Teoria Ecológica del Derecho y el Concepto Jurídico de la Libertad, 2 ed., Buenos Aires.
- Dalberg-Larsen 1979: J. Dalberg-Larsen, Four Phases in the Development of Modern Legal Science, 23 SSL.
- 1977: Retsvidenskaben som samfundsvidenskab, Copenhagen.
- Dewey 1924: Dewey, Logical Method and Law, 10 Cornell Law Quarterly.
- Dias 1976: R.W.M. Dias, Jurisprudence, 4 ed. London.
- 1970: Temporal Approach Towards a New Natural Law, 28 Cambridge Law Journal.
 - 1968: Legal Politics, Norms Behind the Grundnorm, 26 Cambridge Law Journal.
- Dictionary of Philosophy, London 1979.
- Dorsey 1968: G.L. Dorsey, Law and the Formative Process of Social Order, ARSP Beiheft Neue Folge 5.
- Dray 1957: W. Dray, Laws and Explanation in History, Oxford.
- Dreier 1981: R. Dreier, Recht - Moral - Ideologie. Studien zur Rechtstheorie, Frankfurt a.M.
- 1981:2: Bemerkungen zur Theorie der Grundnorm, Kelsen-convention in Vienna, September 1981.
 - 1979: Bemerkungen zur Rechtserkenntnistheorie, Rechtstheorie Beiheft 1, Berlin.
 - 1978: Zur Theoriebildung in der Jurisprudenz, in: Recht und Gesellschaft, Festschrift f. Schelsky, Berlin.
- Dyckjaer-Hansen 1971: K. Dyckjaer-Hansen, Gaeldende ret og juridisk metode, Juristen.
- Dworkin 1977: R. Dworkin, Taking Rights Seriously, London (quoted from 6th printing, Cambridge Mass. 1979, with Appendix).
- 1977:2: Seven Critics, 11 Georgia Law Review.
- Eckhardus 1750: Ch. H. Eckhardus, Hermeneuticae juris libri duo..., Jena.
- Eckhoff 1980: T. Eckhoff, Retningslinjer of "tumregler", TfR.
- 1976: Guiding Standards in Legal Reasoning, in: 29 Current Legal Problems.
 - 1976:2: Feed back i rettstenkning og rettssystemer, JFT.
 - 1972: Retskilделаere, Oslo.
 - 1971: Rettferdighet ved utveksling og fordeling av verdier, Oslo-Bergen-Tromsø.
 - 1969: Litt om det juridiske rettighetsspråk, in: Festschrift til A. Ross, Copenhagen.
- Eckhoff and Sundby 1976: T. Eckhoff and N.K. Sundby, Rettssystemer, Oslo.
- 1975: The Notion of Basic Norm(s) in Jurisprudence, 19 SSL.
- Eek et. al. 1975: H. Eek, K. Grönfors, J. Hellner, H. Thornstedt, L. Wahlén, L. WeTamson, Juridikens källmaterial, 8 ed. Stockholm.

- Eek 1972: H. Eek, Lagkonflikter i tvistemål, Stockholm.
- Ehrlich 1967: E. Ehrlich, Recht und Leben. Gesammelte Aufsätze zur Rechtstatsachenforschung und zur Freirechtslehre, ed. by M. Rehbinder, Berlin.
- 1913: Grundlegung der Soziologie des Rechts, Munich - Leipzig.
 - 1903: Freie Rechtsfindung und freie Rechtswissenschaft, Leipzig.
- Eibl-Eibesfeldt 1975: I. Eibl-Eibesfeldt, Ethology - The Biology of Behavior, New York.
- Eilstein and Przełęczki 1966: H. Eilstein and M. Przełęczki (edd.), Teoria i doświadczenie, Warsaw.
- Einstein 1953: A. Einstein, The Laws of Science and the Laws of Ethics, in: H. Feigl and M. Brodbeck (edd.), Readings in the Philosophy of Science, New York.
- Ekelöf 1973: P.O. Ekelöf, Rättegång I, 3 ed. Stockholm.
- 1969: Uttrycket "gällande rättsregel". En studie i juridisk terminologi, in: Festskrift till Arnholm, Oslo.
 - 1958: Teleological Construction of Statutes, 2 SSL.
 - 1952: Är termen rättighet ett syntaktiskt hjälpmedel utan mening?, SvJT.
 - 1951: Är den juridiska doktrinen en teknik eller en vetenskap?, Lund.
- Engisch 1968: K. Engisch, Einführung in das juristische Denken, 4 ed. Stuttgart - Berlin - Köln - Mainz.
- 1963: Logische Studien zur Gesetzesanwendung, 3 ed., Heidelberg.
- Erenius 1971: G. Erenius, Oaktamhet, Stockholm.
- Esser 1972: J. Esser, Vorverständnis und Methodenwahl in der Rechtsfindung, 2 ed. Frankfurt/M.
- 1964:2: Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts, 2 ed. Tübingen.
- Evers 1970: J. Evers, Argumentationsanalys för jurister, Lund.
- Ewing 1934: A.C. Ewing, Idealism: A Critical Survey, London.
- Eyben 1969: W.E. v. Eyben: Gaeldende ret, Festskrift til Ross, Copenhagen.
- Farago 1980: J. Farago, Intractable Cases: The Role of Uncertainty in the Concept of Law, 55 New York University Law Review.
- Feigl 1962: H. Feigl, Some Major Issues and Development in the Philosophy of Science of Logical Empiricism, Minnesota Studies in the Philosophy of Science, Vol. 1, 4 ed. Minneapolis.
- Feinberg 1975: J. Feinberg, Rawls and Intuitionism, in: N. Daniels (ed.), Reading Rawls, Oxford.
- Feyerabend 1975: P.K. Feyerabend, Against Method, London.
- Finnis 1980: J. Finnis, Natural Law and Natural Rights, Oxford.
- Fodor 1968: J.A. Fodor, Functional Explanation in Psychology, in: M. Brodbeck (ed.) Readings in the Philosophy of the Social Sciences, New York - London.
- Føllesdal 1966: D. Føllesdal, A Model Theoretic Approach to Causal Logic, Det Kgl. norske videnskabers selskabs skrifter No 2.

- Føllesdal 1965: Quantification into Causal Contexts, Boston Studies in the Philosophy of Science Vol.2.
- Frändberg 1973: A Frändberg, Om analog användning av rättsnormer, Uppsala.
- Frank 1957: Ph. Frank, Philosophy of Science, Englewood Cliffs.
- 1941: The Law of Causality and Experience, Between Physics and Philosophy, Harvard.
 - 1932: Das Kausalgesetz und seine Grenzen, Wien.
- Frank 1930: J. Frank, Law in the Modern Mind, New York.
- Frege 1892: G. Frege, Über Sinn und Bedeutung, 2 Zeitschrift für Philosophie und philosophische Kritik.
- 1950: The Foundations of Arithmetic, transl. L.J. Austin, Oxford.
- Friedmann 1969: W. Friedmann, Legal Philosophy and Judicial Lawmaking, 61 Columbia Law Review.
- Friedrich 1963: C.J. Friedrich, Justice: The Just Political Act, VI Nomos.
- Frommel 1981: M. Frommel, Die Rezeption der Hermeneutik bei Karl Larenz und Josef Esser, Edelsbach.
- Fuller 1978: L.L. Fuller, The Forms and Limits of Adjudication, 92 Harvard Law Review.
- 1969: The Morality of Law, 2 ed., New Haven and London.
 - 1969:2: Human Interaction and the Law, 14 The American Journal of Jurisprudence.
 - 1968: Anatomy of the Law, Middlesex.
 - 1958: Positivism and Fidelity to Law, 71 Harvard Law Review.
 - 1946: Reason and Fiat in Case Law, 59 Harvard Law Review.
- Furberg 1971: M. Furberg, Saying and Meaning, Oxford.
- Gadamer 1960: H.G. Gadamer, Wahrheit und Methode, Tübingen.
- Gallie 1965: W. Gallie, Essentially Contested Concepts, 56 Proceedings of the Aristotelian Society.
- Gärdenfors 1980: P. Gärdenfors, Teoretiska begrepp och deras funktion, in: Hansson 1980.
- 1980:2: Sneeds rekonstruktion av teoriers struktur och dynamik, in: Hansson 1980.
- Gardies 1976: J.L. Gardies, De quelques voies de communication entre l'„etre" et le „devoir-etre", Revue Philosophique No. 3.
- de Geer 1953: L. de Geer, Om den juridiska stilen, 1853, reprinted as an appendix to SvJT 1953.
- Gehlen 1975: A. Gehlen, Der Mensch, Wiesbaden.
- Gellner 1975: E. Gellner, Beyond Truth and Falsity, 26 British Journal for the Philosophy of Science.
- Gény 1899: F. Gény, Methode d'interprétation et sources en droit privé positif, Paris.
- Germann 1967: A.O. Germann, Probleme und Methoden der Rechtsfindung, 2 ed., Bern.
- Germann 1964: Zum Primat des Gesetzes, in: Festschrift till Olivecrona, Stockholm.

- Germann 1953: Kommentar zum schweizerischen Strafgesetzbuch, Zürich.
- 1946: Methodische Grundfragen, Basel.
- Gewirth 1979: A. Gewirth, The Bases and Content of Human Rights, 13 Georgia Law Review.
- Gibson 1960: Q. Gibson, The Logic of Social Enquiry, London.
- Giedymin 1959: J. Giedymin, Indukcjonizm i antyindukcjonizm, Studia Filozoficzne.
- Gihl 1957: T. Gihl, The Legal Character and Sources of International Law, 1 SSL.
- Gill 1974: J.H. Gill, On Reaching Bedrock, 5 Metaphilosophy.
- Golding 1968: M.P. Golding, Toward a Theory of Human Right, 52 The Monist.
- Goodman 1967: N. Goodman, The Epistemological Argument, in: R.S. Cohen and M.W. Wartofsky, edd., Boston Studies in the Philosophy of Science, vol. 3.
- Gordon 1978: M.M. Gordon, Human Nature, Class and Ethnicity, New York - Oxford.
- Górecki 1975: J. Górecki (ed.), Sociology and Jurisprudence of Leon Petrażycki, Urbana - Chicago - London.
- 1975:2: Social Engineering Through Law, in: Górecki 1975.
- Greenwood and Stini 1977: J. Greenwood and W. Stini, Nature, Culture and Human History, New York.
- Grzybowski 1961: S. Grzybowski, Wypowiedź normatywna oraz jej struktura formalna, Kraków.
- Habermas 1973: J. Habermas, Wahrheitstheorien, in: Wirklichkeit und Reflexion, Festschrift für W. Schulz, ed. by H. Fahrenbach, Pfullingen.
- Hägerström 1964: A. Hägerström, Philosophy and Religion, transl. and ed. by R.T. Sandin, London.
- 1953: Inquiries into the Nature of Law and Morals, Stockholm.
 - 1939: En straffrättslig principundersökning, SvJT.
 - 1929: Selbstdarstellung, in: R. Schmidt (ed.), Die Philosophie der Gegenwart in Selbstdarstellungen, vol. 7, Leipzig.
 - 1927: Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung, vol. 1, Uppsala - Leipzig.
 - 1917: Till frågan den objektiva rättsens begrepp, I, Uppsala.
 - 1908: Das Prinzip der Wissenschaft. Eine logisch-erkenntnistheoretische Untersuchung. I: Die Realität, Uppsala - Leipzig.
- Hagströmer 1889: J. Hagströmer. Om förhållandet emellan lagstiftning och vetenskap på den svenska straffrättens område, TfR.
- Hall 1973: J. Hall, Foundations of Jurisprudence, Indianapolis.
- 1947: Integrative Jurisprudence, in: Interpretation of Modern Legal Philosophies, Essays in Honor of Roscoe Pound, New York.
- Halldén 1973: S. Halldén, Sannolikhetens logik, Lund.
- Hamilton 1854: Sir W. Hamilton, ed., The Works of Thomas Reid, 4 ed., London.
- Hanson 1958: N.R. Hanson, Patterns of Discovery, Cambridge.
- Hansson 1980: B. Hansson (ed.), Metod eller anarki, Lund.

- Hare 1981: R.M. Hare, *Moral Thinking*, Oxford.
- 1973: Rawls Theory of Justice, 23 Philosophical Quarterly.
 - 1972: Principles, 73 Proceedings of Aristotelian Society.
 - 1963: *Freedom and Reason*, Oxford.
 - 1955: Theology and Falsification, in: A.N. Flew and A. Macintyre (ed.), *New Essays in Philosophical Theology*, London.
 - 1954: Universalisability, 55 Proceedings of the Aristotelian Society.
 - 1952: *The Language of Morals*, Oxford.
- Harman 1973: G. Harman, *Thought*, Princeton.
- Harris 1979: J.W. Harris, *Law and Legal Science*, Oxford.
- Hart 1964: H.L.A. Hart, Self-referring Laws, in: *Festschrift till Olivecrona*, Stockholm.
- 1961: *The Concept of Law*, Oxford.
- Hart and Sacks 1958: Henry M. Hart Jr. and A. Sacks, *The Legal Process*, Temp. ed., Cambridge, Mass.
- Hassemer 1968: W. Hassemer, *Tatbestand und Typus*, Köln - Berlin - Bonn-Munich.
- Heather 1981: M.A. Heather, *Legal Structures for Law Machines*, in: *Pre-Proceedings of the International Study Congress on Logica, Informatica, Diritto*, Florence.
- Heck 1932: P. Heck, *Begriffsbildung und Interessenjurisprudenz*, Tübingen.
- Hedenius 1975: I. Hedenius: *Analysen av äganderättsbegreppet*, in: B. Belfrage and L. Stille, edd., *Filosofi och rättsvetenskap*, Lund.
- 1963: *Om rätt och moral*, 2 ed., Stockholm (1 ed., 1941).
- Heller 1961: T. Heller, *Logik und Axiologie der analogen Rechtsanwendung*, Berlin.
- Hellner 1980: J. Hellner, *Författningsspråket*, in: Hellner, *Julskrift*, Stockholm.
- 1976: *Skadeståndsrätt*, 3 ed., Stockholm.
 - 1975: *Argumentation de lege ferenda*, SvJT.
 - 1972: *Värderingar i skadeståndsrätten*, in: *Festschrift till P.O. Ekelöf*, Stockholm.
 - 1969:2: *Analys av lagtext med hjälp av datamaskin*, in: *Festschrift till Arnholm*, Oslo.
 - 1967: *Köprätt*, Stockholm.
- Hempel 1968: C.G. Hempel, *The Logic of Functional Analysis*, in: M. Brodbeck, ed., *Readings in the Philosophy of Social Sciences*, New York - London.
- 1966: *Explanation in Science and in History*, in: W.H. Dray, ed., *Philosophical Analysis and History*, New York.
 - 1965: *Aspects of Scientific Explanation*, in: Hempel, *Aspects of Scientific Explanation and Other Essays in the Philosophy of Science*, New York.
 - 1963: *The Theoretician's Dilemma*, in: *Minnesota Studies in the Philosophy of Science*, vol. II. (1 ed. 1958).

- Hempel 1962: Deductive-Nomological vs. Statistical Explanation, in: Minnesota Studies in the Philosophy of Science, Vol. III.
- Henkel 1977: H. Henkel, Einführung in die Rechtsphilosophie, 2 ed.
- Herlitz 1972: N. Herlitz: 1974 års regeringsform?, SvJT.
- Hermerén 1973: G. Hermerén, Kunskapens utveckling, Insikt och handling.
- 1972: Värdering och objektivitet, Umeå.
- Hesslow 1980: G. Hesslow, Evolutionistiska tankar i vetenskapsteorin, in: Hansson 1980.
- Hessler 1970: N. Hessler, Nya Jordabalken (Kap 16 och 18), Hävd och godtrosförvärv, Uppsala.
- 1957: Ett spörsmål om lagstiftning inom fastighetsrätten, SvJT.
- Hintikka 1962: J. Hintikka, Knowledge and Belief, Ithaca.
- Hjerner 1969: L. Hjerner, Om rättsfallstolkning, Stockholm.
- Hobbes 1651: T. Hobbes, Leviathan or the Matter, Form and Power of a Commonwealth Ecclesiastical and Civil.
- Höffe 1977: O. Höffe, Zur Rolle der Entscheidungstheorie bei der Rechtfertigung von Gerechtigkeitsprinzipien - kritische Überlegungen im Anschluss an Rawls, 11 Erkenntnis.
- Hohfeld 1964(1919): W.N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, New Haven.
- Hollo 1981: E.J. Hollo, Die Definition von geltendem Recht in der Rechtsfindung, Helsinki.
- Holmes 1897: O.W. Holmes, The Path of the Law, 10 Harvard Law Review.
- Honoré 1973: A.M. Honoré, Romerretten og den moderne retstaenking, TfR.
- Hruschka 1965: J. Hruschka, Die Konstitution des Rechtsfalles, Berlin.
- Hudson 1979: W.D. Hudson, ed., The Is/Ought Question, London (first published 1969).
- Hughes 1968: G. Hughes, Rules, Policy and Decision Making, 77 Yale Law Journal.
- Hult 1952: Ph. Hult, Lagens bokstav och lagens andemening, SvJT.
- Husserl 1913: E. Husserl, Logische Untersuchungen II:1, 2 ed., Halle a.d.S. (transl. by D. Cairns).
- Hutcheson 1938: I.C. Hutcheson, Judgment Intuitive, Chicago.
- Iuul, Ross and Trolle 1967: S. Iuul, A. Ross and J. Trolle, Indledning til retsstudiet, Copenhagen.
- Jägerskiöld 1969: S. Jägerskiöld, Tjänstemannarätt, Stockholm.
- 1959: Prejudikatens betydelse på förvaltningens område, Förvaltningsrättslig tidskrift, quoted from Studiematerial i allmän rättslära, Stockholm 1971.
- Jareborg 1981: N. Jareborg, Regler och riktlinjer - en replik, TfR.
- 1980: Straff och rättvisa, in: Påföljdsval, straffmätning och straffvärde, Stockholm.
- 1979: Regler och riktlinjer, TfR.
- 1975: Värderingar, Lund.
- Jhering 1916: R.v. Jhering, Der Zweck im Recht, 5 ed. Leipzig.

Jhering 1888: Der Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung, 4 ed. Leipzig. (Vol. II:1, 1880; vol. II:2, 1883; vol. III:1, 1888).

- 1885: Scherz und Ernst in der Jurisprudenz.

Jørgensen 1978: S. Jørgensen, Values in Law, Copenhagen.

- 1977: Retspositivisme og naturret, LXVI Acta Jutlandica, Århus.
- 1977:2: Idealism and Realism in Jurisprudence, 21 SSL.
- 1973: Review of Rawls 1973, TfR.
- 1970: Ret og samfund, Copenhagen.
- 1968: Vertrag und Recht, Copenhagen.

Kamenka 1979: E. Kamenka, What is Justice, in: E. Kamenka and A. Erh-Soon Tay (edd.) Justice, London.

Kanger 1972: S. Kanger, Law and Logic, 38 Theoria.

- 1963: "Rättighetsbegreppet". In: Sju filosofiska studier tillägnade Anders Wedberg den 30 mars 1963. Philosophical Studies published by the Department of Philosophy, University of Stockholm. No. 9. Stockholm.
- 1957: New Foundations for Ethical Theory. Part 1. Stockholm (reprinted in Deontic Logic: Introductory and Systematic Readings, ed. R. Hilpinen, Dordrecht, 1971.)

Kanger and Kanger 1966: S. Kanger and H. Kanger, Rights and Parliamentarism, 32 Theoria.

Kant 1797: I. Kant, Metaphysik der Sitten, in: Kant's Gesammelte Schriften, hrsg. v. der Königlich Preussischen Akademie der Wissenschaften, Bd. 6, Berlin 1907. (Engl. transl. of Part I: The Metaphysical Elements of Justice, transl. by J. Ladd, Indianapolis - New York - Kansas City 1965).

- 1797:2: Metaphysische Anfangsgründe der Rechtslehre, in: Kant's Gesammelte Schriften, ibid. Bd. 6. (Engl. transl.: The Philosophy of Law, 1887, trans. by Hastie).
- 1788: Kritik der praktischen Vernunft, in: Gesammelte Schriften supra, Band 5, Berlin (Engl. transl. Critique of Practical Reason, transl. by L.W. Beck, Indianapolis - New York 1956.)
- 1785: Grundlegung zur Metaphysik der Sitten, in: Gesammelte Schriften, supra, Band 4, Berlin 1911. (Engl. transl. Foundations of the Metaphysics of Morals, trans. by L.W. Beck, with Critical Essays, ed. by R.P. Wolff, Indianapolis, New York 1969.)
- 1781(7): Kritik der reinen Vernunft, ed. by R. Schmidt, Leipzig 1962. "A" refers to the first original edition of 1781, "B" to the second of 1787. (Engl. transl. Critique of Pure Reason, transl. by F.M. Müller, New York 1966).

Kantorowicz 1906: H. Kantorowicz, Der Kampf um die Rechtswissenschaft, Heidelberg.

Kaptein 1978: H.J.R. Kaptein: De Rechtvaardiging van Rechtvaardigheid: Het Belang van Rawls' Methodologie voor "A Theory of Justice", 40 Tijdschrift voor Filosofie.

Katz 1966: J.J. Katz, The Philosophy of Language, New York - London.

- 1962: The Problem of Induction and Its Solution, Chicago.

Kaufmann 1972: A. Kaufmann, Rechtsphilosophie im Wandel. Stationen eines Weges, Frankfurt/M. 1972.

- Kekes 1979: J. Kekes, The Centrality of Problem-Solving, 22 Inquiry.
- 1973: Towards a Theory of Rationality, 3 Philosophy of Social Science.
 - 1973:2: The Rationality of Metaphysics, 4 Metaphilosophy.
- Kelsen 1979: H. Kelsen, Allgemeine Theorie der Normen, Wien.
- 1968: Logisches und metaphysisches Rechtsverständnis, 18 Österreichische Zeitschrift für öffentliches Recht.
 - 1967: The Pure Theory of Law, 2 ed. Berkeley 1967 (translation of Kelsen 1960).
 - 1964: Die Funktion der Verfassung, in: H. Klecatsky, R. Marcic, H. Schambeck, edd., Die Wiener rechtstheoretische Schule, Frankfurt - Zürich - Salzburg - München 1968.
 - 1963: Die Selbstbestimmung des Rechts, in Wiener...
 - 1962: Derogation, in Wiener ...
 - 1961: Naturrechtslehre und Rechtspositivismus, in Wiener...
 - 1960: Reine Rechtslehre, 2 ed. Wien.
 - 1960:2: Vom Geltungsgrund des Rechts, in Wiener...
 - 1958: Der Begriff der Rechtsordnung, in Wiener...
 - 1951: Was ist ein Rechtsakt?, in Wiener...
 - 1945: The General Theory of Law and State, New York.
 - 1934: Reine Rechtslehre, 1 ed. Wien.
 - 1928: Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus, in Wiener...
 - 1923: Hauptprobleme der Staatsrechtslehre, 2 ed. Tübingen.
 - 1916: Die Rechtswissenschaft als Norm- oder als Kulturwissenschaft, in Wiener...
 - 1911: Hauptprobleme der Staatsrechtslehre, 1 ed. Tübingen.
- Kemeny 1952: J.G. Kemeny, Extension of the Methods of Inductive Logic, 3 Philosophical Studies.
- Kemp 1968: J. Kemp, The Philosophy of Kant, Oxford, quoted from the paperback edition 1979.
- Kenny 1975: A. Kenny, Wittgenstein, Harmondsworth.
- Keynes 1921: J.M. Keynes, A Treatise on Probability, London.
- Kirchmann 1848: J.H.v. Kirchmann, Die Wertlosigkeit der Jurisprudenz als Wissenschaft, 3 ed. Berlin.
- Klami 1980: H.T. Klami, Anti-Legalism, Turku.
- Klug 1966: U. Klug, Juristische Logik, 3 ed. Berlin-Göttingen-Heidelberg.
- Kneale 1953: W. Kneale, Induction, Explanation and Transcendent Hypotheses, in: H. Feigl and M. Brodbeck (edd.), Readings in the Philosophy of Science, New York.
- Koch 1980: H-J. Koch, Das Frankfurter Projekt zur juristischen Argumentation: Zur Rehabilitation des deduktiven Begründens juristischer Entscheidungen, in: W. Hassemer, A. Kaufmann, U. Neumann, ed., Argumentation und Recht, Wiesbaden.

- Koch 1977: Über juristisch-dogmatisches Argumentieren im Staatsrecht, in: H.-J. Koch, ed., Seminar: Die juristische Methode im Staatsrecht, Frankfurt/M.
- Koch and Rüssmann 1982: H.-J. Koch and H. Rüssmann, Juristische Begründungslehre, Munich.
- Koertge 1978: N. Koertge, Towards a New Theory of Scientific Inquiry, in: G. Radnitzky and G. Andersson (edd.), Progress and Rationality in Science, Dordrecht - London.
- Kotarbińska 1962: J. Kotarbińska, The Controversy: Deductionism Versus Inductionism, International Congress For Logic, Methodology, Philosophy of Science, ed. by Tarski, Nagel and Suppes, Stanford.
- Kotarbiński 1975: T. Kotarbiński, The Concept of Adequate Theory, in: Görecki 1975.
- Krarup 1981: O. Krarup. Kompetencenormer og gældende ret, Ufr (B).
- Krawietz 1981: W. Krawietz, Rechtssystem und Rationalität in der juristischen Dogmatik, Rechtstheorie Beiheft 2, Berlin.
- 1979: Zum Paradigmenwechsel im juristischen Methodenstreit, Rechtstheorie Beiheft 1, Berlin.
 - 1978: Juristische Entscheidung und wissenschaftliche Erkenntnis, Wien - New York.
- Kriele 1979: M. Kriele, Recht und praktische Vernunft, Göttingen.
- Kubeš 1977: V. Kubeš, Grundfragen der Philosophie des Rechts, Wien - New York.
- Kuhn 1977: T.S. Kuhn, The Essential Tension, Chicago.
- 1970: The Structure of Scientific Revolutions, 2 ed. Chicago.
 - 1970:2: Reflections on my Critics, in: I. Lakatos and A. Musgrave, edd., Criticism and the Growth of Knowledge, Cambridge.
- Kulka 1977: T. Kulka, How Far Does Anything Go? Comments on Feyerabend's Epistemological Anarchism, Philosophy of the Social Sciences.
- Kutschera 1972: F.v. Kutschera, Wissenschaftstheorie, Munich.
- Laakso 1980: S. Laakso, Über die Dreidimensionalität des Rechts und des Juristischen Denkens, Tampere.
- 1979: Über die Dreidimensionalität des juristischen Denkens, in: Peczenik and Uusitalo, edd., Reasoning on Legal Reasoning.
- Lachmayer 1981: F. Lachmayer, Präkonstitutionelles Recht, Rechtstheorie Beiheft 2, Berlin.
- 1977: Die Geltungsneutralität der Grundnorm, 28 Österreichische Zeitschrift für öffentliches Recht und Völkerrecht.
 - 1977:2: Präkonstitutionelles Gewohnheitsrecht und ideologische Organisationen, 99 Juristische Blätter.
- Lakatos 1970: I. Lakatos, Falsification and the Methodology of Scientific Research Programmes, in: Lakatos and A. Musgrave, edd., Criticism and the Growth of Knowledge, Cambridge.
- Lande 1959: J. Lande, Studia z filozofii prawa, Warsaw.
- Lang, Wróblewski, Zawadzki 1979: W. Lang, J. Wróblewski and S. Zawadzki, Teoria państwa i prawa, Warsaw.
- 1962: Obowiązywanie prawa, Warsaw.
- Lantz 1977: G. Lantz, Eigentumsrecht - ein Recht oder Unrecht?, Uppsala.

- Larenz 1975: K. Larenz, Methodenlehre der Rechtswissenschaft, Berlin - Göttingen - Heidelberg, 3 ed.
- 1964: Über das Verhältnis von Interpretation und richterlicher Rechtsfortbildung, in: Festschrift till Olivecrona, Stockholm.
- Laudan 1977: L. Laudan, Progress and Its Problems, London.
- Lauridsen 1981: P.S. Lauridsen, Ret og tvang, UfR (B).
- 1980: Er kompetencenormer gældende ret?, UfR (B).
 - 1978: Om jus og normer, TfR.
 - 1977: Retslaeren, Copenhagen.
 - 1974: Studier i retspolitisk argumentation, Copenhagen.
- Lehrer 1974: K. Lehrer, Knowledge, Oxford, quoted from new impression 1978.
- Leibniz 1902: G.W. Leibniz, Discourse on Metaphysics, transl. by Montgomery, Chicago.
- Lenzen 1954: V.F. Lenzen, Causality in Natural Science, Springfield - Toronto.
- Lindahl 1977: L. Lindahl, Position and Change, Dordrecht.
- Lins 1971: M. Lins, The Philosophy of Law, Rio de Janeiro.
- Ljungman 1971: S. Ljungman, Industriellt rättskydd, Stockholm.
- Llewellyn 1960: K.N. Llewellyn, The Common Law Tradition. Deciding Appeals, Boston - Toronto.
- Lögdberg 1964: A. Lögdberg, Några anteckningar om betydelsen av uttalanden i en lags förarbeten, in: Festschrift till Olivecrona, Stockholm.
- Lorenz 1973: K. Lorenz, Die Rückseite des Spiegels. Versuch einer Naturgeschichte menschlichen Erkennens, Munich.
- Lucas 1980: J.R. Lucas, On Justice, Oxford.
- Luhmann 1976: N. Luhmann, Ausdifferenzierung des Rechtssystems, 7 Rechtstheorie.
- 1973: Die juristische Rechtsquellenlehre aus soziologischer Sicht, in: Soziologie, Sprache, Bezug zur Praxis, Verhältnis zu anderen Wissenschaften, René König zum 65. Geburtstag.
 - 1973:2, Die Funktion des Rechts: Erwartungssicherung oder Verhaltenssteuerung?, IVR World Congress Madrid (mimeographed).
 - 1972: Rechtssoziologie, Hamburg.
- Lundstedt 1956: A.V. Lundstedt, Legal Thinking Revised, Stockholm.
- 1932-1936: Die Unwissenschaftlichkeit der Rechtswissenschaft, I-II:1, Berlin.
- Lyons 1973: D. Lyons, On Formal Justice, 58 Cornell Law Review.
- 1971: The Internal Morality of Law, 71 Proceedings of the Aristotelian Society.
- MacCormick 1981: N. MacCormick, H.L.A. Hart, London.
- 1978: Legal Reasoning and Legal Theory, Oxford.
 - 1978:2: Dworkin as Pre-Benthamite, LXXXVII The Philosophical Review.
 - 1976: Children's Rights: A Test Case for Theories of Rights, LXII ARSP.
 - 1974: Law as Institutional Fact, 90 Law Quarterly Review (also: Edin. Univ. Inaug. Lect. No. 52; 1973.)

- Mackie 1977: J.L. Mackie, *Ethics. Inventing Right and Wrong*, Harmondsworth, quoted from new impression 1979.
- 1977:2: *The Third Theory of Law*, 7 Philosophy and Public Affairs.
 - 1974: *The Cement of the Universe. A study of Causation*, Oxford.
- Macklin 1977: R. Macklin, *Moral Progress*, 87 Ethics.
- Makkonen 1965: K. Makkonen, *Zur Problematik der juridischen Entscheidung*, Turku.
- Malcolm 1963: N. Malcolm, *Knowledge and Certainty*, Englewood Cliffs, quoted from Cornell Paperback 1975.
- Marantz 1979: H. Marantz, *Can the Obligation People Have to Obey the Law be Justified?* IVR World Congress, Basel 1979, paper No. 097.
- Marcic 1963: R. Marcic, *Das Naturrecht als Grundnorm der Verfassung*, XIII Zeitschrift für öffentliches Recht Neue Folge.
- Marc-Wogau 1968: K. Marc-Wogau, *Studier till Axel Hägerströms filosofi*, Falköping.
- 1967: *On Historical Explanation*, Theoria 1962, quoted from Marc-Wogau, *Philosophical Essays*.
 - 1940: *Axel Hägerströms verklighetsteori*, Tiden.
- Mårtensson 1980: B. Mårtensson, *Falsifiering eller förändring genom vetenskapliga revolutioner: Popper versus Kuhn*, in: Hansson 1980.
- Mautner 1979: T. Mautner, *Kant's Relation to the Natural Law Tradition*, IVR World Congress, Basel.
- Maxwell 1953: B.N. Maxwell, *On the Interpretation of Statutes*, 10 ed. London.
- Máynez 1948: E.G. Máñez, *The Philosophical-Juridical Problem of the Validity of Law*, in: *The 20th Century Philosophy Series III*.
- McKeon 1963: R. McKeon, *Justice and Equality*, VI *Nomos*.
- Mehlberg 1958: H. Mehlberg, *The Reach of Science*, Toronto.
- Merkel 1968: A. Merkel, *Justizirrtum und Rechtswahrheit* (1 ed. 1925), in: H. Klecatsky, R. Marcic, H. Schambeck, ed., *Die Wiener rechtstheoretische Schule*, Frankfurt - Zürich - Salzburg - München.
- Merton 1957: R.K. Merton, *Social Theory and Social Structure*, New York.
- Mill 1886: J.S. Mill, *A System of Logic Ratiocinative and Inductive*, 8 ed. London.
- Model 1961: *The Concept and the Role of the Model in Mathematics and Natural and Social Sciences*, Dordrecht.
- Moore 1939: G.E. Moore, *Proof of an External World*, in: XXV Proceedings of the British Academy.
- 1925: *A Defence of Common Sense*, in: J.H. Muirhead, ed., *Contemporary British Philosophy*, 2nd Series.
- Moore 1981: M. Moore, *The Semantics of Judging*, Southern California Law Review.
- Morawetz 1980: T. Morawetz, *The Philosophy of Law*, New York - London.
- Moritz 1972: M. Moritz, *Kann das (richterliche) Urteil deduziert werden?* in: *Festskrift till Ekelöf*, Stockholm.
- 1969: *Über konditionale Imperative*, in: *Festskrift till Ross*, Copenhagen.

Moritz 1968: Inledning till värdeteori, 2 ed. Lund.

- 1968:2: Über den Begriff der juristischen Person, Akten des XIV Internationalen Kongress für Philosophie, Wien.
- 1966: Normentheorie und deontische Logik, mimeographed, Lund.
- 1963: Permissive Sätze, Erlaubnissätze und deontische Logik, in: *Philosophical Essays Dedicated to Gunnar Aspelin*, Lund.
- 1960: Über Hohfelds System der juridischen Grundbegriffe, Lund.
- 1954: Der praktische Syllogismus und das juristische Denken, XX Theoria.

Müller 1971: F. Müller, Juristische Methodik, Berlin.

Naess 1953: A. Naess, Interpretation and Preciseness, Oslo.

Nagel 1961: E. Nagel, The Structure of Science, New York.

Newton-Smith 1981: W.H. Newton-Smith, The Rationality of Science, Boston - London - Henley.

Nilstun 1979: T. Nilstun, Moral Reasoning. A Study in the Moral Philosophy of S.E. Toulmin, Lund.

Nino 1978: C.S. Nino, Some Confusions around Kelsen's Concept of Validity, LXIV ARSP.

Nordin 1980: I. Nordin, Teknologi, vetenskap och ad hoc-hypoteser, in: Hansson 1980.

Nörr 1974: D. Nörr, Rechtskritik in der römischen Antike.

Nowacki 1966: J. Nowacki, Analogia legis, Warsaw.

Nowak and Ziemiński, L. Nowak and Z. Ziemiński: Positivist Trends Versus Trends of Natural Law in Modern Comprehension of Law, in: *Contemporary Conceptions of Law*, Warsaw, ed. by A. Łopacka and A. Szklennik.

Nowak 1977: L. Nowak, Wstęp do idealizacyjnej teorii nauki, Warsaw.

- 1974: Zasady marksistowskiej filozofii nauki, Warsaw.
- 1973: Interpretacja prawnicza, Warsaw.
- 1971: U podstaw marksistowskiej metodologii nauk, Warsaw.
- 1968: Próba metodologicznej charakterystyki prawnictwa, Poznań.

Nowell-Smith 1973: P.H. Nowell-Smith, A Theory of Justice?, Philosophy of the Social Sciences.

- 1969: Ethics, London (paperback).

Nozick 1974: R. Nozick, Anarchy, State and Utopia, New York.

Ofstad 1980: H. Ofstad, Ansvar og handling, Oslo - Bergen - Tromsø.

Olivecrona 1978: K. Olivecrona, Bentham's "Veil of Mystery", in: *Current Legal Problems*, London.

- 1977: Die zwei Schichten im naturrechtlichen Denken, LXIII ARSP.
- 1976: Rättsordningen, 2 ed. Lund.
- 1975: The Term "Property" In Locke's Two Treatises of Government, LXI ARSP.
- 1973: Das Meinige nach der Naturrechtslehre, LIX ARSP.
- 1971: Law as Fact, 2 ed., London.
- 1969: The Concept of a Right According to Grotius and Pufendorf, in: *Festschrift für Hermann, Bern*.

Olivecrona 1959: *The Legal Theories of Axel Hägerström and Vilhelm Lundstedt*, 3 SSL.

- 1943: *Domen i tvistemål*, Lund.
- 1942: *Der Imperativ des Gesetzes*, Copenhagen.
- 1940: *Om lagen och staten*, Lund.
- 1939: *Law as Fact*, 1 ed. Copenhagen - London.

Opařek 1974: K. Opařek, *Z teorii dyrektyw i norm*, Warsaw.

- 1973: *Directives, Optatives and Value Statements*, XVI, 61-62 Logique et Analyse.
- 1970: *The Problem of the Existence of the Norm*, in: *Festschrift für Adolf J. Merkl*, München - Salzburg.
- 1970:2: *On the Logical-Semantical Structure of Directives*, XIII, 49-50 Logique et Analyse.
- 1969: *Przedmiot prawoznawstwa a problem tzw. "płasczyn prawa"*, Państwo i Prawo.
- 1962: *Problemy metodologiczne nauki prawa*, Warsaw.
- 1957: *Prawo podmiotowe*, Warsaw.

Opařek and Woleński 1975: K. Opařek and J. Woleński, *Das Problem der Axiomatisierung des Rechts*, in: *Rechtstheorie und Rechtsinformatik*, Wien.

Opařek and Wróblewski 1969: K. Opařek and J. Wróblewski, *Zagadnienia teorii prawa*, Warsaw.

Opařek and Zakrzewski 1958: K. Opařek and W. Zakrzewski, *Z zagadnień praworzędności socjalistycznej*, Warsaw.

Ossowski 1962: S. Ossowski, *O osobliwościach nauk społecznych*, Warsaw.

Ott 1976: W. Ott, *Der Rechtspositivismus*, Berlin.

Otte 1980: G. Otte, *Der sogenannte mos geometricus in der Jurisprudenz*, in: *Quaderni Fiorentini* 8/1979.

Painlevé 1922: P. Painlevé, *Les Axiomes de la Mécanique*, Paris.

Pap 1963: A. Pap, *An Introduction to the Philosophy of Science*, London.

- 1958: *Semantics and Necessary Truth, An Inquiry into the Foundations of Analytic Philosophy*, New Haven.

Passmore 1979: *Civil Justice and Its Rivals*, in: E. Kamenka and A. Erh-Soon Tay, edd., *Justice*, London.

Patzig 1976: G. Patzig: *Immanuel Kant: Wie sind synthetische Urteile a priori möglich?* in: *Grundprobleme der grossen Philosophen der Neuzeit II*, ed. by Josef Speck, Göttingen.

Paulson 1981: S.L. Paulson, *Subsumption, Derogation and Noncontradiction in "Legal Science"*, 48 The University of Chicago Law Review.

- 1980: *Material and Formal Authorization in Kelsen's Pure Theory*, 39 Cambridge Law Journal.
- 1980:2: *Zur Problem der Normenkonflikte*, LXVI ARSP.
- 1979: *Paulson, Neue Grundlagen für einen Begriff der Rechtsgeltung*, LXV ARSP.

Peczenik 1983: A. Peczenik, *Grundlagen der juristischen Argumentation*, Wien - New York.

- Peczenik 1981: On the Nature and Function of the Grundnorm, Rechtstheorie Beiheft 2, Berlin.
- 1981:2, Legal Errata, Pre-proceedings of the International Congress on Logica, Informatica, Diritto, Florence.
 - 1980: Juridikens metodproblem, 2 ed., Stockholm.
 - 1979: Causes and Damages, Lund.
 - 1979:2: Non-equivalent Transformations and the Law, in: Peczenik and J. Uusitalo, edd., Reasoning on Legal Reasoning, Vammala.
 - 1979:3: Peczenik 1979:2, reprinted in Rechtstheorie Beiheft 1, Berlin.
 - 1979:4: Formalism, Rule-Skepticism and Juristic Operationism, IVR World Congress, Basel 1979 Paper No. 054, to be published under the headline Right and Wrong in Legal Reasoning.
 - 1979:5 Rätt och fel i juridisk argumentation, 11 Lundaforskare föreläser.
 - 1979:6: Cumulation and Compromise of Reasons in the Law, Nomos.
 - 1978:2: Informatica giuridica, fonti del diritto e valutazioni, 2 Informatica e Diritto.
 - 1977: Juridisk operationism, JFT.
 - 1975: The Structure of a Legal System, 6 Rechtstheorie.
 - 1975:2: Petrażycki and the Post-realistic Jurisprudence, in: J. Górecki, ed., Sociology and Jurisprudence of Leon Petrażycki, Urbana - Chicago - London.
 - 1974: Juridikens metodproblem, 1 ed., Stockholm.
 - 1972: The Concept "Valid Law", 16 SSL.
 - 1972:2: Om rättvisa, TfR.
 - 1971: Analogia legis. Analogy from Statutes in Continental law, Proceedings of the World Congress for Legal and Social Philosophy, Brussels.
 - 1971:2: Principles of Law, 2 Rechtstheorie.
 - 1971:4: Review of A. Verdross, Statisches und dynamisches Naturrecht, SvJT.
 - 1971:5: Review of A. Verdross, Statisches und dynamisches Naturrecht, LVII ARSP.
 - 1969: Empirical Foundations of Legal Dogmatics, XII, 45 Logique et Analyse.
 - 1969:2: Essays in Legal Theory, Copenhagen.
 - 1969:3: The Concepts of Rights, II Archivum Iuridicum Cracoviense.
 - 1968: Płaszczyzny badania prawa, XXIII Państwo i Prawo.
 - 1968:2: Juristic Definition of Law, 78 Ethics.
 - 1968:3: Norms and Reality, Theoria.
 - 1968:4: Struktura normy prawnej, Studia Prawnicze.
 - 1967: Doctrinal Study of Law and Science, XVII Österreichische Zeitschrift für öffentliches Recht.
 - 1966: Wartość naukowa dogmatyki prawa, Kraków.
 - 1963: Podstawy semantyczne logiki norm, doctoral thesis, Kraków, unpublished.

- Peczenik 1962: Wykładnia a fortiori, Zeszyty naukowe UJ, Prawo 9.
- Perelman 1980: Ch. Perelman, Justice Re-examined, LXVI ARSP.
- 1930:2: Zur Theorie der Gerechtigkeit, 11 Rechtstheorie.
 - 1963: The Idea of Justice and the Problem of Argument, London.
 - 1958:2: Self-Evidence and Proof, 33 Philosophy.
- Perelman and Olbrechts-Tyteca 1969: Ch. Perelman and L. Olbrechts-Tyteca, The New Rhetoric. A Treatise on Argumentation, Notre Dame - London (transl. of Perelman and Olbrechts-Tyteca 1958).
- 1958: La Nouvelle Rhétorique: Traité de l'Argumentation, Bruxelles.
- Petrażycki 1968: L. Petrażycki, Wstęp do nauki polityki prawa, Warsaw (transl. of Vvedenye v nauku politiki prava, St. Petersburg 1896-1897).
- 1959-60: Teoria prawa i państwa w związku z teorią moralności, Warsaw (transl. of Teoria prava i gosudarstva v svyazi s teoriey npravstvennosti, St. Petersburg 1909).
 - 1959: Wstęp do nauki prawa i moralności, Warsaw, (transl. of Vvedenye v izuchenye prava i npravstvennosti, St. Petersburg 1908).
 - 1925: O ideale społecznym i odrodzeniu prawa naturalnego, Warsaw 1925.
 - 1895: Die Lehre vom Einkommen, vol. 2, Berlin.
- Petrén 1956: G. Petrén, Domstols lagprövningsrätt, SvJT, also in: Uppsatser i allmän rättslära II, Stockholm 1970.
- Petrén and Ragnemalm 1980: G. Petrén and H. Ragnemalm, Sveriges Grundlagar, Stockholm.
- Petryszak 1980: N.G.L. Petryszak, Human Nature, Ideology and Social Theory, LXVI ARSP.
- Pettit 1974: P. Pettit, A Theory of Justice?, Theory and Decision.
- Phillips 1977: D. Phillips, Wittgenstein and Scientific Knowledge. A Sociological Perspective, London.
- Poincaré 1902: H. Poincaré, La Science et l'Hypothese, Paris.
- Pollock 1974: J.L. Pollock, Knowledge and Justification, Princeton.
- Popper 1979: K.R. Popper, The Growth of Scientific Knowledge, Frankfurt/M.
- 1972: Objective Knowledge, Oxford.
 - 1970: Normal Science and Its Dangers, in: I. Lakatos and A. Musgrave, ed., Criticism and the Growth of Knowledge, Cambridge.
 - 1966: The Open Society and Its Enemies, 5 ed. London, new impression 1969.
 - 1960: The Poverty of Historicism, 2 ed. London.
 - 1959: The Logic of Scientific Discovery, New York.
- Pound 1959: R. Pound, Jurisprudence, St. Paul.
- 1954: An Introduction to the Philosophy of Law, rev. ed. London.
 - 1942: Social Control Through Law, New Haven.
 - 1923: Interpretations of Legal History, New York.
 - 1910: Law in Books and Law in Action, 44 American Law Review.
- Pöyhönen 1981: J. Pöyhönen, Problems of a Realist Interpretation of Theories in Legal Dogmatics, Rechtstheorie Beiheft 3, Berlin.

- Pöyhönen 1981:2: The Role of Theories in Legal Dogmatics, Rechtstheorie Beiheft 2, Berlin.
- Prawitz 1978: D. Prawitz, Om moraliska och logiska satsers sanning, in: L. Bergström, H. Ofstad and D. Prawitz (edd.), En filosofibok tillägnad Anders Wedberg, Stockholm.
- Puchta 1893: G.F. Puchta, Cursus der Institutionen, 10 ed.
- Putnam 1967: H. Putnam, The 'Innateness Hypothesis' and Explanatory Models in Linguistics, in: R.S. Cohen and M.W. Wartofsky (edd.), Boston Studies in the Philosophy of Science, vol. III.
- Quine 1969: W.V.O. Quine, Ontological Relativity and Other Essays, New York.
- 1960: Word and Object, Cambridge, Mass.
 - 1953: From a Logical Point of View, Cambridge, Mass.
- Rabinowicz 1979: W. Rabinowicz, Universalizability, Dordrecht - Boston - London.
- Radbruch 1950: G. Radbruch, Rechtsphilosophie, Stuttgart.
- Rapp 1979: H. Rapp, Michel Villey on Modern Natural Law, LXV ARSP.
- Rawls 1980: J. Rawls, Kantian Constructivism in Moral Theory, LXVII Journal of Philosophy.
- 1973: A Theory of Justice, paperback, Oxford.
 - 1955: Two Concepts of Rules, Philosophical Review.
- Raz 1982: J. Raz, The Problem about the Nature of Law, in G. Fløistad (ed.), Contemporary Philosophy, vol. 3, The Hague.
- 1979: The Authority of Law, Oxford.
 - 1979:2: Legal Reasons, Sources and Gaps, ARSP Beiheft Neue Folge 11.
 - 1977: Legal Validity, LXIII ARSP.
 - 1974: Kelsen's Theory of the Basic Norm, 19 American Journal of Jurisprudence.
 - 1970: The Concept of a Legal System, Oxford.
- Reale 1962: M. Reale, Filosofia do Direito, Sao Paulo.
- Recaséns Siches 1959: L. Recaséns Siches, Tratado General de Filosofia del Derecho, Mexico.
- Reichenbach 1951: H. Reichenbach, The Rise of Scientific Philosophy, Berkeley - Los Angeles.
- 1949: The Theory of Probability, Berkeley.
 - 1940: On the Justification of Induction, 37 Journal of Philosophy.
- Rescher 1977: N. Rescher, Methodological Pragmatism, Oxford.
- 1973: Coherence Theory of Truth, Oxford.
 - 1969: Lawfulness as Mind-dependent, in: Rescher, ed., Essays in Honor of Carl G. Hempel, Dordrecht.
 - 1966: Distributive Justice, Indianapolis.
- Rodhe 1972: K. Rodhe, Beskrivning - prognos - rekommendation. Punkter till diskussionsinledning vid kursen Verifikationsproblem, Uppsala. (Unpublished)
- 1971: Allmän privaträtt - avtalsrätt - obligationsrätt, SvJT.

- Rodhe 1959: Adjustment of Contracts on Account of Changed Conditions, 3 SSL.
- 1956: Obligationerätt, Stockholm.
- Rödig 1973: J. Rödig, Die Theorie des gerichtlichen Erkenntnisverfahrens, Berlin - Heidelberg - New York.
- 1972: Über die Notwendigkeit einer besonderen Logik der Normen, in: Rechtstheorie als Grundlagenwissenschaft, Jahrbuch für Rechtssoziologie und Rechtstheorie, vol. 2, Bielefeld - Düsseldorf.
- Rolf 1981: B. Rolf, Topics on Vagueness, Lund.
- Rosenberg 1974: J. Rosenberg, Linguistic Representation, Dordrecht - Boston.
- Ross 1968: A. Ross, Directives and Norms, London.
- 1967: Review of Olivecrona 1976 (ed. fr. 1966), TfR.
 - 1958: On Law and Justice, London.
 - 1953: Om ret og retfaerdighed, Copenhagen.
 - 1946: Towards a Realistic Jurisprudence, Copenhagen.
 - 1929: Theorie der Rechtsquellen: Ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmen-historischer Untersuchungen, Leipzig-Wien 1929.
- Rossvaer 1971: V. Rossvaer, Kant og Wittgenstein, Oslo.
- Rottleuthner 1981: H. Rottleuthner, Rechtstheorie und Rechtssoziologie, Freiburg - München.
- 1980: Zur Methode einer Folgenorientierten Rechtsanwendung, ARSP Beiheft Neue Folge 13.
 - 1976: Hermeneutik und Jurisprudenz, in: H.J. Koch, ed., Juristische Methodenlehre und analytische Philosophie, Kronberg/Ts.
- Russell 1954: B. Russell, Human Society in Ethics and Politics, London.
- 1935: Religion and Science, London.
- Samek 1974: R.A. Samek, The Legal Point of View, New York.
- Savigny 1840: F.v. Savigny, System des heutigen römischen Rechts, vol. 1, Berlin.
- 1814: Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft, Heidelberg.
- Schild 1979: W. Schild, Theorie und Praxis bei Hans Kelsen, 10 Rechtstheorie.
- Schilpp 1974: P.A. Schilpp, ed., The Philosophy of Karl Popper, La Salle, Illinois.
- Schlick 1931: M. Schlick, Die Kausalität in der gegenwärtigen Physik, 19 Die Naturwissenschaften.
- Schmidt 1980: F. Schmidt, Arbetsuppgifter och tankevägar i rättsvetenskapen, TfR.
- 1978: The Uppsala School of Legal Thinking, 22 SSL.
 - 1976: Facklig arbetsrätt, Stockholm.
 - 1974: Åktenskapsrätt 5 ed., Stockholm.
 - 1972: Bundna och öppna argument, in: Festskrift till Ekelöf, Stockholm.
 - 1969: Kollektiv arbetsrätt, 3 ed. Stockholm.

- Schmidt 1960: Model, Intention, Fault, Three Canons for Interpretation of Contract, 4 SSL.
- 1959: Tjänsteavtalet, 1 ed., Stockholm.
 - 1957: Construction of Statutes, 1 SSL.
 - 1955: Domaren som lagtolkare, in: Festschrift för Herlitz, Stockholm, quoted from Studiematerial i allmän rättslära, Stockholm 1971.
- Schreiber 1966: R. Schreiber, Die Geltung von Rechtsnormen, Heidelberg.
- Schweitzer 1959: O. Schweitzer, Freie richterliche Rechtsfindung intra legem als Methodenproblem, Basel.
- Searle 1969: J.R. Searle, Speech Acts, Cambridge.
- 1969:2:How to Derive "Ought" from "Is", in: Hudson 1979 (1 ed. in LXXIII The Philosophical Review, 1964).
- Sellars 1963: W. Sellars, Science, Perception and Reality, London.
- Sethna 1962: M.J. Sethna, Nature, Scope and Fruits of Synthetic Jurisprudence, in: Sethna, ed., Contributions to Synthetic Jurisprudence, Bombay.
- Shuman 1963: S.I. Shuman, Legal Positivism, Its Scope and Limitations, Detroit.
- Sidgwick 1907: H. Sidgwick, Methods of Ethics, 7 ed. London.
- Siitonen 1979: A. Siitonen, Law and Morality - Some Problems, 10 Rechtstheorie.
- Simon 1957: H.A. Simon, Administrative Behavior, New York.
- Simpson 1973: A.W.B. Simpson, The Common Law and Legal Theory, Oxford Essays in Jurisprudence. Second Series, Oxford.
- 1961: The Ratio Decidendi of a Case and the Doctrine of Binding Precedent, Oxford Essays in Jurisprudence, Oxford.
- Sjögren 1918: W. Sjögren, Om domskäl i tvistemål, TfR.
- Skinner 1974: B.F. Skinner, About Behaviorism, New York.
- Sneed 1971: J.D. Sneed, The Logical Structure of Mathematical Physics, Dordrecht.
- Spranger 1950: E. Spranger, Lebensformen, 8 ed.
- Stammmer 1902: R. Stammmer, Die Lehre von dem richtigen Rechte, Berlin. (English transl. I. Huisk 1925: Stammmer, Theory of Justice.)
- Stebbing 1933: L.S. Stebbing, A Modern Introduction to Logic, 2 ed., London.
- Stegmüller 1976: W. Stegmüller, The Structure and Dynamics of Theories, New York - Heidelberg - Berlin.
- 1975: Der Sogenannte Zirkel des Verstehens, Darmstadt.
 - 1974: Probleme und Resultate der Wissenschaftstheorie und Analytischen Philosophie. Band I, Wissenschaftliche Erklärung und Begründung, Berlin - Heidelberg - New York.
 - 1954: Der Begriff des synthetischen Urteils a priori und die moderne Logik, 8 Zeitschrift für Philosophische Forschung.
- Steiner 1977: H. Steiner, Justice and Entitlement, 87 Ethics.
- Stevenson 1944: C.L. Stevenson, Ethics and Language, New Haven, quoted from Yale paperback 1960.
- Stenius 1960: E. Stenius, Wittgenstein's Tractatus, Oxford.

- Stone 1979: J. Stone, Justice not Equality, in: E. Kamenka and A. Erh-Soon Tay, edd., Justice, London.
- 1965: Human Law and Human Justice, Sydney.
 - 1964: Legal System and Lawyers' Reasonings, Stanford.
- Strahl 1970: I. Strahl, Makt och rätt, 5 ed., Stockholm.
- Strawson 1966: P.F. Strawson, The Bounds of Sense, London.
- 1952: Introduction to Logical Theory, London, quoted from the paperback edition London 1964.
- Strömberg 1968: H. Strömberg, Sveriges författning, 2 ed., Lund.
- 1964: Lagstiftning och rättstillämpning, in: Festskrift till Olivecrona, Stockholm.
- Strömberg 1981: T. Strömberg, Rättsfilosofins historia i huvuddrag, Lund.
- 1980: Inledning till den allmänna rättsläran, 8 ed. Lund.
 - 1971: Ur lagtolkningsprincipernas förhistoria: La r  f  r   l  gislatif och autentisk lagtolkning (seminar text).
 - 1970: Om kompetensnormens definition, in: Festskrift till Agge, Stockholm.
 - 1969: Lathund f  r lagl  sare, in: Festskrift till Moritz, Lund.
- Str  mholm 1981: S. Str  mholm, R  tt, r  ttsk  llor och r  ttstill  mpning, Stockholm.
- 1976: Allgemeine Rechtslehre, G  ttingen.
 - 1974: Den juridiska argumentationens relevanskriterier, SvJT.
 - 1972: Lagtolkning: huvudproblem och funktioner, Uppsala.
 - 1972:2: Teleologisk metod och likformig argumentation. Variationer kring ett k  nt tema, in: Festskrift till Ekel  f, Stockholm.
 - 1972:4: Zur Frage nach der juristischen Argumentationstechnik, LVIII ARSP.
 - 1969:2: Till definitionen av begreppet "r  ttsregel", SvJT.
 - 1966: Le droit moral de l'auteur, vol. II:1, Stockholm.
 - 1966:2: Legislative Material and Construction of Statutes. Notes on the Continental Approach, 10 SSL.
- Studnicki 1977: T. Gizbert-Studnicki, Lexicography and Interpretation of Law, LXIII ARSP.
- Summers 1981: R.S. Summers, Pragmatic Instrumentalism in Twentieth Century American Legal Thought - A Synthesis and Critique of Our Dominant General Theory About Law and Its Use, 66 Cornell Law Review.
- 1978: Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification, 63 Cornell Law Review.
 - 1978:2 Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law, 92 Harvard Law Review.
- Sundberg 1978: J. Sundberg, Fr. Eddan t. Ekel  f. Repetitorium om r  ttsk  llor i Norden, M  lm  .
- Sundby 1978: N.K. Sundby, Sondringen mellom regler og retningslinjer - en replikk, TfR.
- 1974: Om normer, Oslo.
 - 1968: "Legal Right in Scandinavian Analyses", Natural Law Forum.

- Tammelo 1980: I. Tammelo, Ungerechtigkeit als Grenzsituation, 61 Schopenhauer-Jahrbuch.
- 1977: Theorie der Gerechtigkeit, Freiburg - München.
 - 1971: Survival and Surpassing, Melbourne.
 - 1948: Drei rechtsphilosophische Aufsätze, Willsbach and Heidelberg.
- Tatarkiewicz 1970: W. Tatarkiewicz, Historia Filozofii, 7 ed. Warsaw.
- Tay 1979: A. Erh-Soon Tay, The Sense of Justice in the Common Law, in: E. Kamenka and Erh-Soon Tay, Justice, London.
- Taylor 1971: C. Taylor, Interpretation and the Science of Man, XXV Review of Metaphysics.
- Tebaldeschi 1979: I. Tebaldeschi, Rechtswissenschaft als Modelwissenschaft, Wien - New York.
- Ten 1979: C.L. Ten, The Soundest Theory of Law, Mind.
- Thibaut 1802: A.F.J. Thibaut, Theorie der logischen Auslegung des römischen Rechts, 2 ed. 1802, reprinted in H.G. Gadamer and C. Boehm, edd., Seminar: Philosophische Hermeneutik, 1976.
- Thornstedt 1960: H. Thornstedt, Legality and Teleological Construction of Statutes in Criminal law, 4 SSL.
- 1956: Om rättsvillfarelse, Stockholm.
 - 1955: Legalitet och teleologisk metod i straffrätten, in: Festskrift till Herlitz, Stockholm.
- Toulmin 1972: Human Understanding I, Oxford.
- 1958: The Uses of Argument, Cambridge, paperback 1976.
 - 1950: An Examination of the Place of Reason in Ethics, Cambridge.
- Tranøy 1980: K.E. Tranøy, Norms of Inquiry: Rationality, Consistency Requirements and Normative Conflict, in: R. Hilpinen, ed., Rationality of Science, Dordrecht.
- 1980:2: Science as a Form of Social Life, manuscript.
 - 1979: Rationality of Science: Consensus or Certainty, manuscript.
 - 1976: The Foundations of Cognitive Activity: An Historical and Systematic Sketch, 19 Inquiry.
- Trigg 1973: R. Trigg, Reason and Commitment, Cambridge.
- Troller 1980: A. Troller, Rechtskonstruktion und Rechtswirklichkeit. Ein Beitrag zu einem kritischen Rechtsrealismus, 11 Rechtstheorie.
- 1980:2: Das Bewusstseinsbild im Rechtsdenken, ARSP Beiheft Neue Folge 13 (IVR Austria I).
 - 1975: Grundriss einer selbstverständlichen juristischen Methode und Rechtsphilosophie, Basel and Stuttgart.
- Tugendhat 1979: E. Tugendhat, Comments on Some Methodological Aspects of Rawls' "Theory of Justice", 1 Analyse und Kritik. Zeitschrift für Sozialwissenschaften.
- Tuomela 1977: R. Tuomela, Human Action and Its Explanation, Dordrecht - Boston.
- Uusitalo 1979: J. Uusitalo, The Representation of the Legal System in Legal Dogmatics, in: Peczenik and Uusitalo, edd., Reasonings on Legal Reasoning, Vammala.

- Undén 1956: Ø. Undén, Några ord om domstolskontroll över lagars grundlagsenlighet, SvJT.
- Vahlén 1951: L. Vahlén, Formkravet vid fastighetsköp, Stockholm.
- 1971: Fastighetsköp, Stockholm.
- Vaihinger 1922: H. Vaihinger, Die Philosophie des Als-Ob, 7 ed., Leipzig.
- Van den Berghe 1975: P. Van den Berghe, Man in Society, New York.
- Verdross 1971: A. Verdross, Statisches und dynamisches Naturrecht, Freiburg.
- 1950: Zur Klärung des Rechtsbegriffes, in die Wiener...
- 1930: Die Rechtstheorie Hans Kelsens, in die Wiener...
- Vesey 1963: G.N.A. Vesey, Unthinking Assumptions and Their Justification, 63 Mind.
- Victor 1977: D. Victor, Rättssystem och vetenskap, Stockholm.
- Viehweg 1974: Th. Viehweg, Topik und Jurisprudenz, 5 ed., München.
- 1953: Topik und Jurisprudenz, 1 ed., München.
- Villey 1975: M. Villey, La Formation de la Pensée Juridique Moderne, 4 ed. Paris.
- Vogel 1972: H.H. Vogel, Der skandinavische Realismus, Frankfurt/M.
- Waldstein 1980: W. Waldstein, Ist das "suum cuique" eine Leerformel?, in: Ius humanitatis, Festschrift zum 90. Geburtstag von Alfred Verdross, ed. by H. Miehsler, E. Mock, B. Simma, I. Tammelo, Berlin.
- Wallin 1971: G. Wallin, Föräldrar och barn, Lund.
- Walter 1980: R. Walter, Das Problem des Verhältnisses von Recht und Logik in der reinen Rechtslehre, 11 Rechtstheorie.
- 1968: Kelsens Rechtslehre im Spiegel rechtsphilosophischer Diskussion in Österreich, XVIII Österreichische Zeitschrift für öffentliches Recht.
- Wasserstrom 1961: R.A. Wasserstrom, The Judicial Decision, Stanford - London.
- Watson 1919: J. Watson, Psychology From the Standpoint of a Behaviorist, Philadelphia.
- Watkins 1978: J. Watkins, Corroboration and the Problem of Content-Comparison, in: G. Radnitzky and G. Andersson (edd.), Progress and Rationality of Science, Dordrecht - London.
- Weber 1978: M. Weber, Economy and Society, Berkeley - Los Angeles - London (ed. by G. Roth and C. Wittich).
- Wedberg 1951: A. Wedberg, Some Problems in the Logical Analysis of Legal Science, Theoria.
- Weinberger 1981: O. Weinberger, Normentheorie als Grundlage der Jurisprudenz und Ethik. Eine Auseinandersetzung mit Hans Kelsens Theorie der Normen, Berlin.
- 1981:2: Analytisch-dialektische Gerechtigkeitstheorie, Rechtstheorie Beiheft 3, Berlin.
- 1980: Über schwache Naturrechtslehren, in: H. Miehsler, E. Mock, B. Simma and I. Tammelo (edd.), Ius humanitatis, Festschrift zum 90. Geburtstag von Alfred Verdross.
- 1980:2 Das Recht als institutionelle Tatsache, 11 Rechtstheorie.

- Weinberger 1979:2: Schlüsselprobleme der Moraltheorie, in: Vernunft, Erkenntnis, Sittlichkeit, Internationales philosophisches Symposium Göttingen 1977 aus Anlass des 50. Todestages von Leonard Nelson, Hamburg.
- 1979:3: Tatsachen und Tatsachenbeschreibungen, in: Sozialphilosophie aus Aufklärung, Festschrift für Ernst Topitsch, Tübingen.
 - 1978: Theorie der Gerechtigkeit und De-lege-ferenda Argumentation, 29 Österreichische Zeitschrift für öffentliches Recht und Völkerrecht.
 - 1977: Der nomische Allsatz, Grazer philosophische Studien 4.
 - 1977:2: Intersubjektive Kommunikation, Normenlogik und Normendynamik, 8 Rechtstheorie.
 - 1977:3: Begründung oder Illusion. Erkenntnistheoretische Gedanken zu John Rawls' Theorie der Gerechtigkeit, 3 Zeitschrift für Philosophische Forschung.
 - 1976: Interpretation und Zielsetzung, Grazer philosophische Studien 2.
 - 1975: Ex falso quodlibet in der deskriptiven und in der präskriptiven Sprache, 6 Rechtstheorie.
 - 1974:2: Contrary-to-fact and Fact-transcedent Conditionals, 7 Ratio.
 - 1971: Die Pluralität der Normensysteme, LVII ARSP.
 - 1970: Rechtslogik, Wien - New York.
 - 1958: Die Sollsatzproblematik in der modernen Logik, Prague.
- Weinberger und Weinberger 1979: Ch. Weinberger and O. Weinberger, Logik, Semantik, Hermeneutik, München.
- 1979:2: Grundzüge der Normenlogik und ihre semantische Basis, 10 Rechtstheorie.
- Welamson 1976: L. Welamson, Några synpunkter på HD:s verksamhet efter 1971 års fullföljdsreform, in: Svensk rätt i omvandling, Studier tillägnade Hilding Eek, Seve Ljungman och Folke Schmidt, Stockholm.
- 1965: Konkurs, Stockholm.
- Welinder 1975: C. Welinder, Beskattning av inkomst och förmögenhet, Malmö.
- 1974: Skattepolitik, Lund.
- Werner 1978: A. Werner, Introduktion till kunskapsteorins historia I, 2 ed. Lund.
- 1979: Språk och handling, Lund.
- Westerberg 1953: O. Westerberg, RF § 84, Stockholm.
- Weyl 1949: H. Weyl, Philosophy of Mathematics and Natural Science, rev.ed. Princeton.
- White 1970: A.R. White, Truth, London.
- Whorf 1956: B.L. Whorf, Language, Thought and Reality, Cambridge, Mass.
- de Wild 1980: A.H. de Wild, De Rationaliteit van het rechterlijk Oordeel, Deventer.
- Williams 1966: G.C. Williams, Adaptation and Natural Selection, Princeton.
- Wilson 1975: E.O. Wilson, Sociobiology - New Synthesis, Cambridge, Mass.
- Winch 1958: P. Winch, The Idea of a Social Science and Its Relation to Philosophy, London.

- Windscheid 1906: B. Windscheid, Lehrbuch des Pandektenrechts, 9 ed. prepared by T. Kipp, Frankfurt/M.
- Winkler 1979: G. Winkler, Sein und Sollen, Rechtstheorie Beiheft 1, Berlin.
- Winslade 1975: W.J. Winslade, Aspects of Leon Green's Tort Theory: Causation and the Role of the Judge, LXI ARSP.
- Wisdom 1952: J. Wisdom, Gods, in: A. Flew, ed., Logic and Language; 1st publ. in Proceedings of the Aristotelian Society.
- Wittgenstein 1969: L. Wittgenstein, On Certainty, Oxford.
- 1967: Remarks on the Foundations of Mathematics, Cambridge, Mass.
 - 1967:2 Ludwig Wittgenstein und der Wiener Kreis, shorthand notes of F. Waismann, ed. McGuinness, Oxford.
 - 1964: Philosophische Bemerkungen, Oxford.
 - 1958: The Blue and Brown Books, New York - Hagerstown - San Francisco - London.
 - 1953: Philosophical Investigations, Oxford.
 - 1922: Tractatus Logico-Philosophicus, London.
- Woleński 1980: J. Woleński, Z zagadnień analitycznej filozofii prawa, Warsaw - Krakow.
- Worall 1978: J. Worall, The Ways in Which the Methodology of Scientific Research Programmes Improves on Popper's Methodology, in: G. Radnitzky and G. Andersson (edd.), Progress and Rationality of Science, Dordrecht - London.
- Wolff 1977: R.P. Wolff, Understanding Rawls. A Reconstruction and Critique of A Theory of Justice, Princeton.
- Von Wright 1974: G.H. von Wright, Causality and Determinism, New York and London.
- 1972: Wittgenstein on Certainty, in: v. Wright (ed.), Problems in the Theory of Knowledge, Den Haag.
 - 1972:2: On So-Called Practical Inference, 15 Acta Sociologica.
 - 1971: Explanation and Understanding, Ithaca.
 - 1963: Norm and Action, London.
 - 1963:2: The Varieties of Goodness, London.
 - 1957: The Logical Problems of Induction, Oxford.
- Wróblewski 1983: J. Wróblewski, Fuzziness of Legal System, a report for the International Congress of Philosophy of Law, La Plata.
- 1979: Verification and Justification in the Legal Sciences, Rechtstheorie Beiheft 1.
 - 1979:2: Meaning and Truth in Judicial Decision, Helsinki.
 - 1974: Legal Syllogism and Rationality of Judicial Decision, 5 Rechtstheorie.
 - 1973: The Relations between Normative Systems, VI Archivum Juridicum Cracoviense.
 - 1973:2: Wartości a decyzja sądowa, Warsaw.
 - 1972: Sądowe stosowanie prawa, Warsaw.
 - 1969: Prawo i płaszczyzny jego badania, Państwo i Prawo.

- Wróblewski 1964: The Problem of the Meaning of the Legal Norm, XIV Österreichische Zeitschrift für öffentliches Recht.
- 1963: Semantic Basis of the Theory of Legal Interpretation, Logique et Analyse.
 - 1961: Interpretatio secundum, praeter et contra legem, Państwo i Prawo.
 - 1959: Zagadnienia teorii wykładni prawa ludowego, Warsaw.
- Yoshino 1978: H. Yoshino, Zu Ansätzen der juristischen Logik, in: I. Tammelo and H. Schreiner, edd., Strukturierungen und Entscheidungen im Rechtsdenken, Wien - New York 1978.
- 1978:2: Über die Notwendigkeit einer besonderen Normenlogik als Methode der juristischen Logik, in: U. Klug, Th. Ramm, F. Rittner, B. Schmiedel (edd.), Gesetzgebungstheorie, Juristische Logik, Zivil- und Prozessrecht. Gedächtnisschrift für Jürgen Rödig, Berlin - Heidelberg - New York.
- Zadeh 1975: L.A. Zadeh, Fuzzy Logic and Approximative Reasoning, 30 Synthese.
- Ziemiński 1980: Z. Ziemiński, Problemy podstawowe prawoznawstwa, Warsaw.
- 1970: Norms of Competence as Norms of Conduct, III Archivum Iuridicum Cracoviense.
- Zippelius 1980: R. Zippelius, Einführung in die juristische Methodenlehre, 3 ed., München.
- 1973: Das Wesen des Rechts, 4 ed., Munich.
- Zirk-Sadowski 1979: M. Zirk-Sadowski, Postulat etyki bezkodeksowej a stosunek prawa do moralności, I, 25 Acta Universitatis Lodziensis.
- 1977: Prawo a kultura, I, 19 Acta Universitatis Lodziensis.
- Zittelmann 1903: E. Zittelmann, Lücken im Recht, Leipzig.
- Zuleta 1981: E. Zuleta Puceiro, Paradigma dogmatico y ciencia del derecho, Madrid.
- 1981:2: System and Function in Legal Dogmatics, Rechtstheorie Beiheft 2, Berlin.

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